(1)

Supreme Court, U.S.
FILED

No. 94 1860 MAR 30 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Edward L. PATTEN, M.D., Petitioner

v.

UNITED STATES of America, Respondent

Petition for Writ of Certiorari to the United States Courts of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Edward L. Patten, M.D.
Inmate Number 49012-079
Federal Correctional Institute
Three Rivers, Texas 78071-4300

106 pp

QUESTIONS PRESENTED FOR REVIEW

1. Under the Constitution and the Sentencing Guidelines (U.S.S.G.), was Petitioner denied due process and other rights if the district court relied on the pre-sentencing report as evidence, relied on the pre-sentencing report to notify Petitioner of the court's imminent decisions, and failed to provide for a proper opportunity to contest the pre-sentencing report when the court had ultimately decided to adopt the entire report, in light of the fact that contrary to the opinions of the Fifth Circuit other federal circuits have held that a pre-sentence report is not evidence and requires supporting information when used to effect (or enhance) a sentence?

2. Under the Constitution, should Petitioner, simply by virtue of being found guilty of certain acts at trial, be compelled to defend against allegations, assertions, and assumptions of any kind (and more particularly contained in a pre-sentence report), at anytime, prior to presentation of proof or evidence by the government or any accuser as the Fifth Circuit has held?

3. Considering prior holdings, findings and considered dicta of this Court, the unique and unusual issues presented by this case and the unexplainable waiver of Petitioner's rights, has the Fifth Circuit wrongly decided that Petitioner failed to demonstrate harmful prejudice caused by ineffective assistance of appeal counsel?

TABLE OF CONTENTS

Questions Presented for Review i

Table of Authorities vi

Opinions of Lower Courts vii

Statement of Jurisdiction vii

Constitutional Provisions, Statutes, and Rules Involved vii

Statement of the Case

A. Course of Proceedings 1

B. Relevant Facts 2

Reasons for Granting the Writ 4

Appendix

A. Fifth Circuit Opinion Affirming Denial of Section 2255 Motion 24

B. District Court's Denial of Section 2255 Motion 36

C. Fifth Circuit Opinion Affirming Original Conviction 44

D. Defendant's Objections to PreSentence Report 66

E. Defendant's Supplemental Memorandum of Objections to PreSentence Report 74

F. Sentencing Transcript 80

TABLE OF AUTHORITIES

CASES

Evitts v. Lucey, 469 U.S. 387,
105 S.Ct.830, 83 L.Ed.2d 821 (1985). 16

Lockhart v. Fretwell, - U.S. - ,
113 S.Ct. 838, 122 L.Ed.2d 180 (1993). 15

Penson v. Ohio, 488 U.S. 75,
109 S.Ct. 346, 102 L.Ed.2d 300 (1988). 16

Strickland v. Washington, 466 U.S. 668,
104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). 15

United States v. Deisch, 20 F.3d 139 (5th Cir. 1994). 9

United States v. Duarte, 950 F.2d 1255 (7th Cir. 1991),
cert. denied, 113 S.Ct. 174 (1992). 10

United States v. Fischer, 905 F.2d 140 (7th Cir. 1990). 10

United States v. Galloway, 976 F.2d 414 (8th Cir 1992),
cert. denied, - U.S. -, 113 S.Ct. 1420,
122 L.Ed.2d 790 (1993). 13

United States v. Holt, 969 F.2d 781 (8th Cir. 1992). 13

United States v. Mahler, 984 F.2d 899 (8th Cir. 1992). 13

United States v. Patten, M.D., 956 F.2d 266 (Table)
(5th Cir. Feb. 21, 1992) (unpublished). 1

United States v. Patten, M.D., 40 F.3d 774
(5th Cir. 1994). 9, 13, 21

United States v. Ransom, 990 F.2d 1011 (8th Cir. 1993). 13

United States v. Streeter, 907 F.2d 781 (8th Cir. 1990). 13

United States v. Tavano, 12 F.3d 301
(1st Cir. 1993). 6, 10, 11

United States v. Williams, 22 F.3d 580 (5th Cir.),
cert. denied, - U.S. -, 115 S.Ct. 367, - L.Ed.2d - (1994). 9

OPINIONS OF LOWER COURTS

The opinion of the Court of Appeals for the Fifth Circuit denying the appeal under 28 U.S.C. sec. 2255 from the United States District Court for the Southern Division of Texas is reported in 40 F.3d 774 (5th Cir. 1994). (Appendix A)

The opinion of the United States District Court denying a Motion to Correct a Sentence under 28 U.S.C. sec. 2255 was not reported.(Appendix B)

The opinion of the Court of Appeals for the Fifth Circuit affirming conviction was reported in 956 F.2d 266 (Table) (5th Cir. Feb. 21, 1992) (unpublished). (Appendix C)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit (Appendix A) was entered on December 30, 1994. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment, United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. U.S.S.G. Section 1B1.3 (1991 ed.) which provides:

Relevant Conduct (Factors that Determine the Guideline)

(a) Chapters Two(Offense Conduct) and Three Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense were in furtherance of that offense;

(2) solely with respect to offenses of a character for which Sec. 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

4. U.S.S.G. Section 6A1.3 (1991 ed.) which provides:

Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1). Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

Commentary

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. sec. 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F. Supp. 751 (D.C. Wis 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." United

States v. Fatico, 579 F.2d 713. Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir 1971).

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

STATEMENT OF THE CASE

A. Course of Proceedings -

On August 10, 1990, in a cause then pending before the United States District Court for the Southern District of Texas, Houston Division, entitled United States of America v. Edward L. Patten, M.D., Crim. No. H-89-183-S-1, Petitioner was found guilty of eighty-nine (89) counts by a jury on an indictment which alleged one hundred and one (101) counts. The charges of conviction included: One (1) count of violation of 21 U.S.C. sec. 846 (conspiracy to distribute Schedule II and IV controlled substances); One (1) count of violation of 18 U.S.C. sec. 371 (conspiracy to dispense a Schedule IV controlled substance and PBZ); Sixty-eight (68) counts of violation of 21 U.S.C. sec. 841 (unlawfully distributing Schedule II and IV controlled substances); Eighteen (18) counts of violation of 42 U.S.C. sec. 1320 (making false statements in application for benefits under a state health-care program and aiding and abetting); and One (1) count of violation of 18 U.S.C. sec. 1510 (obstruction of a criminal investigation). The conspiracy was alleged to have occurred from February, 1985 to February 19, 1989.

On November 2, 1990, the District Court entered judgment, and Petitioner was sentenced to eighty-four (84) months imprisonment, one hundred thousand ($100,000) dollars fine five (5) years probation and a special assessment of four thousands four hundred and fifty ($4450) dollars.

On February 21, 1992, the Court of Appeals for the Fifth Circuit affirmed the conviction. United States v. Patten, 956 F.2d 266 (Table) (5th Cir. Feb. 21, 1992) (unpublished). No petition for Writ of Certiorari was sought. (Appendix C)

On November 12, 1993, Petitioner filed a Motion to Correct a Sentence under 28 U.S.C. sec. 2255. The Motion was denied by the District Court and was entered on February 2, 1994. (Appendix B)

Petitioner filed an appeal with the Court of Appeals for the Fifth Circuit from the denial of the 28 U.S.C. sec. 2255 Motion. The Court of Appeals issued a judgment affirming the District Court's decision on December 30, 1994. (Appendix A)

B. Relevant Facts -

During Petitioner's criminal trial in the District Court, there was mention, by an alleged, unindicted, co-conspirator of certain drugs which had not been included in the indictment. As a result of hearing the mention of these drugs, the government, Petitioner believes, searched his records and other records. At some point, it was decided by the government that an amount of additional drugs should be added to Petitioner's case. These additional drugs were not introduced at trial but were included by the investigators in the pre-sentence report as grounds to enhance the sentence above that which would have been otherwise appropriate. This caused the sentencing range to be increased from 37-46 to 70-87 months.

Petitioner, upon receiving the Pre-Sentencing Report, filed written objections denying the 'allegations' and requesting a hearing to contest their 'reliability' and relevancy. Def's Obj. to Pre-Sen. Rpt. pp. 1-3 (App. D pp. 67-70); Def's Supp. Memo. in Support of Obj. to Pre-Sen. Rpt. pp. 3-4 (App. E pp. 77-78). Included in the objections was the notice to the court that Petitioner believed himself "somewhat limited in the ability to assert with specificity and clarity, each factual mistake of which he complains." Def's Supp. Memo. in Support of Obj. to PreSen Rpt. at p. 4 (App. E p. 78).

The trial had been long; there were many many witnesses, pieces of evidence, and exhibits involved in that process. The attention and intensity of the defense had been focused on the trial strategy. Introduction of these new allegations presented a real and unfair burden.

At sentencing, Petitioner again asserted objections to some of the material in the pre-sentence report which was to be used to increase the sentencing range.

> "Yes, Your Honor. There is a request for a hearing in the event that the Court considers for guideline purposes unadjudicated conduct. It is our position that it should not be considered in the absence of a hearing, and if the Court disregards unadjudicated conduct, then I believe I'm correct in saying that our request is moot." Sen. Tr. at pp. 2-3. (App. F pp. 82-83).

The court denied the hearing, adopted the pre-sentence report, and set the sentence based on it. The government had presented nothing or no one to support the allegations, of the investigators, contained in the pre-sentence report. The government simply adopted the information contained in the report, as the district court had done.

Petitioner's attorney timely filed an appeal with the Court of Appeals for the Fifth Circuit. The appeal was based on only three issues: (1) denial of a Motion to Suppress Evidence because of insufficient particularity of a search warrant; (2) the admission of evidence that two co-conspirators had pled guilty to the same offense charges as the ones alleged against Petitioner; (3) the testimony elicited by the government from those two alleged co-conspirators about their agreement to testify truthfully and also the introduction of extrinsic evidence (bolstering) concerning the pleas of the co-conspirators. In spite of his having recognized and raised serious objections to the pre-sentence report, the Sentencing Guidelines, and the sentencing hearing, there was no issue raised by Petitioner's

attorney on appeal relating to any of them. Even though the Circuit Court found that there were improper questions asked by the prosecutor, it found that those questions did not justify reversal. See 5th Cir. Opinion at p. 15-19. (App C pp. 60-64).

On November 12, 1993, Petitioner filed a Motion to Correct a Sentence under 28 U.S.C. sec. 2255 asserting four issues: (1) the trial court erred in failing to hold an evidentiary hearing; (2) the trial court erred when it used the Pre-Sentence Report as the basis for the increased offense level; (3) the constitutionality of U.S.S.G. sec 1B1.3, particularly as used in Petitioner's case, and (4) ineffective assistance of appeal counsel. The Motion was denied by the District Court on February 2, 1994. (Appendix B)

An appeal was timely filed with the Court of Appeals for the Fifth Circuit, and that court affirmed the District Court's decision on December 30, 1994.

This Petition for Writ of Certiorari is sought so that oversights and errors of procedure and interpretation of the Constitution and federal statutes committed by the lower courts can be reviewed and corrected.

REASONS FOR GRANTING THE WRIT

This case presents uncomplicated questions of misjudgments by the federal district court, glaringly inferior representation by appeal counsel and emphatically errant examination by the appellate court. Several of the issues presented should impact profoundly on other cases, federal district and appellate court procedures, and defense attorneys. The relevancy and reliability of information concerning prescription drugs and their lawful use presented unusual questions which the lower courts chose to ignore in making unfair and unjust judge-

ments. The inequities which permeate this case should not be allowed to continue.

Petitioner would submit the following concerning the alleged relevant conduct:

While being questioned during Petitioner's trial, an unindicted, alleged, co-conspirator mentioned the name of two drugs, Biphetamine and Preludine, which had not been included in the indictment. No quantity was mentioned. After hearing of these drugs, the government went through Petitioner's records and probably other records. It was some how determined that an additional number of prescriptions which were purported to be connected with the issues being contested would be submitted in the pre-sentencing report for enhancement purposes.

An attempt was made by the government to introduce this extraneous information during the trial; it was not permitted in by the court. It was dismissed and never considered again by the defendant (as is the usual situation when information is dismissed, rejected, or not allowed by a court). This information resurfaced in the pre-sentencing report as uncharged relevant conduct. Petitioner was unprepared to meet each of these alleged activities and prescriptions at that point. This occurred following a long and difficult trial which was filled with testimony, exhibits, evidence, objections, and rulings. During the trial, some purported evidence was not allowed by the court, and some was dropped by the government.

The district court, at sentencing, chose to use the often incoherent testimony of an unindicted alleged co-conspirator, Alfred McNeal, who admitted to a willingness to say whatever suited his purposes, who had changed his story from that given to the investigators and that given before the grand

jury, who claimed to have been with another, alleged, co-conspirator, Maggie Bullard, at all times - which was by his own testimony proven to be untrue. He also tried to claim that Bullard was not ill - this was also shown to be untrue by his own testimony. In fact, Maggie Bullard was absent from the courtroom, frequently, because of her serious illnesses. It was her unrenounced testimony that she had, in fact, been Petitioner's patient. As a patient she had, indeed, received legitimate prescriptions from Petitioner. The determination of drug quantity to be used for enhancement purposes came solely from the investigators through the pre-sentence report. The concerns of the court in United States v. Tavano, 12 F.3d 301 (1st Cir. 1993) are very appropriate in this case. That court found that,

> "The duty to consider evidence conflicting with trial testimony takes on special urgency in the drug quantity context. Though sentencing judges may look to trial testimony . . ., there are at least two good reasons to be skeptical of total reliance on trial testimony in this context. First, under the guidelines, drug quantity is a factor of extraordinary importance to sentence calculus."

It went on to explain and caution:

> "It is, therefore, imperative for a sentencing court to shine a very bright light on possible answers to drug quantity inquiry. Second, drug quantity testimony, even if subject to reasonable dispute, is not apt to be challenged vigorously at trial . . .. Thus, drug quantity, by its nature, is likely to be a 'factor important to sentencing determination,' and, even after trial, is likely to remain 'reasonably in dispute'. U.S.S.G. sec. 6A1.3. These are precisely the circumstances under which a timely request to consider conflicting evidence must be honored." Id at p. 306.

Unlike the usual drug case which deals with street drugs such as cocaine and marijuana, the drugs in this case

involved prescriptions. Issues of legal dispensing and use are very much involved in this case. Were these particular drugs dispensed and/or used for legitimate purposes? If it cannot be proven otherwise, should a physician's (or any citizen's) liberty be taken away based on assertions or assumptions? These issues were never addressed by any court and never presented in the direct appeal by Petitioner's appeal counsel. In addition, the fact is that there was no statement of quantity by anyone until these drugs were included in the presentencing report.

Because of the nature of the alleged conduct, its impact on sentencing, and the expressed inability of Petitioner to fully address this information, Petitioner asserted that the information was unreliable and should not be used. And, that, he should have an opportunity to fairly challenge these allegations in an evidentiary hearing if the court was going to use it. Petitioner was not permitted this opportunity. Petitioner believes and asserts that this process was fundamentally unfair and unjust, and it deprived Petitioner of Constitutional and statutory rights. Petitioner, further, believes and asserts that the acts and/or omissions of appeal counsel perpetuated the grievous mistakes of the district court by failing to address them at all on appeal, and the Appellate Court has failed to address or correct these injustices.

In view of the unique nature of the allegations involved, the limited and improper procedures employed by both the district and circuit courts, the lack of presentation of proof or evidence by the government, the inadequacy of appeal counsel, the perplexing continuation of the unfairness and injustice by the Fifth Circuit, the seemingly contradictive opinions of the Fifth Circuit concerning some of the issues raised, and the fact that if Petitioner were a citizen living in another circuit he would have been provided different treatment, Petitioner beseeches this Honorable Court to grant a Writ of Certiorari so that these issues may be properly resolved.

Specifically, Petitioner would present to this Court the following:

I. BOTH THE DISTRICT COURT AND THE FIFTH CIRCUIT HAVE MISINTERPRETED AND MISAPPLIED THE REQUIREMENTS AND NECESSITIES FOR HOLDING AN EVIDENTIARY HEARING CONCERNING RELEVANT CONDUCT PRIOR TO SENTENCING IN LIGHT OF THE UNITED STATES SENTENCING GUIDELINES SECTION 1B1.3 AND SECTION 6A1.3 AND THE U.S. CONSTITUTION.

Under the Sentencing Guidelines, the requirements for fairness and opportunity have taken on a more pivotal position in the sentencing phase. Even though the Guidelines provide guidance as to the new procedures and safeguards of which courts should be aware, the Fifth Circuit has refused to adjust its reasoning and the way it expects the district courts to handle sentencing procedures. It is clear that the Sentencing Commission was concerned about the abuses and injustices which could result from the mishandling of sentencing. This is exactly what has occurred in Petitioner's case. The failure of the district court to hold an evidentiary hearing manifestly denied Petitioner due process in the sentencing phase. The Circuit Court's approval of the lower court's action compounded the error. Section 1B1.3, United States Sentencing Guide lines, provides for the use of relevant conduct. However, it does not authorize the use of allegations, assumptions, assertions, and guesses. If it does, as the Fifth Circuit appears to believe, it is unconstitutional. The Fifth Circuit seems to believe that if information is contained in the pre-sentence report it must be true. Since Section 1B1.3, U.S.S.G., was used to sentence Petitioner based on the unproven information contained in the pre-sentence report, it was clearly used unconstitutionally.

Guidelines Section 6A1.3 is explicit in it directives and suggestions; the commentary makes it even more clear that the old ways of dealing with relevant conduct (whether to hold an evidentiary hearing and other sentencing procedures) are not sufficient in many cases, today. Numerous cases, especially those with unique or unusual circumstances, will require and beg for a full opportunity for resolution of disputes. Petitioner's case was such a case. Petitioner presented appeal issues which the Circuit Court did not address squarely. Instead, the court chose to rely on general and unrelated prior holdings and findings. The court even admitted that it did not address Petitioner's issues. See United States v. Patten, 40 F.3d 774, 776 (5th Cir 1994). The Circuit Court attempted to justify its decisions by relying on the decisions, opinions, and holdings of several other cases. Reliance which in some instances was unreasonable, misplaced, and in at least one instance, not relevant. The court cited United States v. Williams, 22 F3d 580, 582-83 (5th Cir.), cert. denied, - U.S. -, 115 S.Ct. 367, - L.Ed.2d - (1994) to explain its holding concerning quantity and relevant conduct. However, the issue raised on appeal was not whether a district court could include a full quantity of drugs shown to be involved in a conspiracy; it was whether the quantity used must be shown to have actually been involved, or more importantly whether it was shown to be iliegally involved. The Circuit Court's reliance on United States v. Deisch, 20 F.3d 139, 147 n.18 (5th Cir. 1994) was misplaced and irrelevant, concerning Petitioner's case, because no issue raised on appeal by Petitioner challenged the holding that "(mere sentencing factors need not be submitted to the petit jury or proved by a reasonable doubt)." The issue raised challenged the conclusion that the threshold of a preponderance of the evidence was met since no evidence was presented to justify the enhancement portion of the sentence. However, if the court is saying that any information not presented in the indictment becomes a sentencing factor when

it is introduced by the government after conviction, then the concerns expressed by the court in United States v. Duarte, 950 F.2d 1255 (7th Cir. 1991), cert. denied, 113 S.Ct. 174 (1992) clearly exists and taint this case. That court feared that the 'aggregation rule' would allow prosecutors to indict on minor charges but seek enhancement later by claiming other 'serious crimes.' (at p. 1263) The court in United States v. Fischer, 905 F.2d 140 (7th Cir. 1990) addressed the problem as follows:

> ". . . we urge prosecutors not to indict defendants on relative minor offenses and then seek enhanced sentences later by asserting . . . more serious crimes for which . . ., the defendant was not prosecuted . . .. It should be avoided - even under the Guidelines and notwithstanding Guidelines Section 1B1.3(a)(2), ..." (At p. 142).

Petitioner would submit that the questions of drug quantity presented in his case deal with he quantity of drugs procured through the use of prescriptions and requires somewhat different methods of determination of the proper amount and weight than those usually faced by sentencing courts.

The First Circuit, in United States v. Tavano, 12 F.3d 301 (1st Cir. 1993), (at p. 307), sought to distinguish (and set parameters for) cases which would be most likely to require an evidentiary hearing by recognizing that not all disputes of drug quantity need to be heard but that those that do not are the ones that "will not alter the applicable offense level, influence the guideline sentencing range, or bring a different mandatory minimum sentence into play." The court also illustrated exactly what it was saying in footnote 10 on page 307. The Fifth Circuit, however, seems to believe that, on the issue of whether a lower court should have held a hearing, it (the Fifth Circuit) is obligated to defer to that lower court. Clearly, the duty of an appellate court is to look at the dispute, the issues presented, the procedures used, the reme-

dies available, and then, to make a determination as to what should happen next. Considering the impact that the Sentencing Guidelines are having on relevant conduct and sentencing, the Fifth Circuit should give lower courts direction and instruction - not simply deference. Moreover, the deference in this case was undue and denied Petitioner due process and other rights. This case presented the exact questions which would call for an opportunity to be heard in the First and Eighth Circuits; it would have been returned to the district court for proper sentencing in either of those circuits. This Court should review the procedures used by the lower courts and provide them guidance in the proper methods they must use. Earlier, at page 306 of Tavano, the court had made a finding concerning the necessity of holding a hearing which Petitioner believes is very reasoned and instructive. That court stated that:

> "The government asserts that . . . the policy statement [to section 6A1.3] mandates only presentation of conflicting evidence; the language mentioning evaluation of such evidence ("may consider") is permissive and, therefore, the government says judicial consideration of presented material is in the court's discretion. We reject this now-you-see-it, now-you-don't prestidigitation, for neither the government's hocus-pocus nor its crabbed reading of section 6A1.3 make any real sense. Drawing an artificial distinction between presentation and consideration - much like drawing a distinction between the opportunity to be heard and the opportunity to be listen to - reduces the guidelines to gibberish, stripping it of its essential meaning. We do not think the Sentencing Commission, in drafting section 6A1.3, could possibly have meant to give defendants such cold gruel, pretending to confer a benefit, yet, simultaneously, withholding the benefit's intrinsic value."

Proper consideration of uncharged conduct which has not been proven should allow for full process before it is used to

increase the time that a citizen (even one who stands convicted) must spend incarcerated. Sentencing courts should not and must not be deferred to when they make mistakes that take away the liberty of citizens. This is particularly important when there is disagreement and disparity in the way federal circuit courts handle relevant conduct.

II. THE FIFTH CIRCUIT HAS GRANTED THE PRE-SENTENCE REPORT THE STATUS OF EVIDENCE RATHER THAN CONSIDERING IT A SOURCE OF INFORMATION AS OTHER CIRCUITS HAVE.

A pre-sentence report is a document which contains numerous kinds of information. Under the Sentencing Guidelines, the pre-sentencing report has taken on much more significance than pre-guidelines reports. In pre-guideline days, a court could receive the report, use all the information, use some of it, or choose to ignore it in determining a sentence. Today, if a court is sentencing under the Guidelines, it has few options. Once the case comes under the guidelines, strict rules come into play. The Fifth Circuit appears to have failed to grasp the importance of the pre-sentence report in today's sentencing scheme. A pre-sentence report must be required to provide more than the mere 'indicia of reliability' which the Fifth Circuit presently asks. It should be a basis on which the sentencing court requires presentation of supporting evidence. Other circuits have insisted that courts take steps in addition to relying on this single report. The Eighth Circuit has clearly held and, obviously, believes that the pre-sentencing report is not to be relied on as evidence, and it correctly holds the government responsible for introducing evidence that will support allegations in the report. It is at that point that the preponderance of the evidence standard becomes relevant in that circuit. The submission of the pre-sentence report should not amount to a presentment of a preponderance of the evidence; the pre-sentence report is not evidence. The Eighth

Circuit has indicated this in many cases, including: United States v. Ransom, 990 F.2d 1011, 1014 (8th Cir 1993); United States v. Mahler, 984 F.2d 899, 905 (8th Cir. 1993); United States v. Holt, 969 F.2d 685, 688-89 (8th Cir. 1992); United States v. Streeter, 907 F.2d 781, 791-92 (8th Cir. 1990).

Specifically, the Eighth Circuit has said, in Ransom (at p. 1014), that, "we caution the District Court that the presentence report is not evidence." In providing some direction to the lower court in that case, the Court further said (as it did in Holt at p. 688), "the Court must either state that the challenged facts will not be taken into account at sentencing, or it must make a finding on the disputed issue." Then, the Court makes very clear what should happen next. In order to prove the allegations, the government "must introduce evidence sufficient to convince the Court by a preponderance of the evidence that the fact in question exists." It is obvious that the Eighth Circuit gives the presentence report the proper weight and reliability that it deserves. It is a document which contains information (some of which is relevant at sentencing; some of which is not). That information may be conjecture, assumption, incomplete, or mistaken.

The Eighth Circuit is cited by the Fifth Circuit in its opinion in Petitioner's case. That opinion states that "[t]he Eighth Circuit has held that the consideration of uncharged conduct does not violate a defendant's constitutional rights if the government proves the conduct by a preponderance of the evidence." See United States v. Patten, 40 F.3d 774, 776 (5th Cir. 1994); citing United States v. Galloway, 976 F.2d 414, 422-27 (8th Cir. 1992), cert. denied, - U.S. -, 113 S.Ct. 1420, 122 L.Ed.2d 790 (1993). It would appear that the Fifth Circuit adopts the holdings and findings of the Eighth Circuit in the area of the determination of the government's obligations, but it rules differently on procedure and places the burden on the defendant. Clearly, the operative phrase in the cited

Eighth Circuit statement is "if the government proves the conduct by a preponderance of the evidence" because it has already been established that that circuit does not accept the pre-sentence report as evidence. Were Petitioner a citizen living in the Eighth Circuit (or several others), he would not have to be concerned about the unfair process of which he now complains.

Significantly, in almost every case cited by Petitioner, the district court (in denying his Section 2255 Motion), and the appellate court, it appears that there was some kind of testimony or proof offered at trial or in a hearing to be able to estimate the quantity of drugs involved as relevant conduct for enhancement purposes. It is extremely important to establish quantity since quantity and type are the factors which determine the amount of increase in the base level.

The Fifth Circuit has consistently stated that the presentence report is generally reliable; however, when presented, by Petitioner, with information which directly suggests an error in the calculation of drug quantity in the report used in Petitioner's case, it chose to ignore and not even acknowledge that information. The district court also chose to disregard this information. The Fifth Circuit has seriously over valued the presentence report. It should simply be a tool to be used by a sentencing court; it has little or no reliability as the sole device relied on to justify enhancing a sentence. It's reliability is contained primarily in the fact that it is prepared by persons who generally are believed to be trustworthy. However, the reputation of the person or persons who prepare it does not transfer or testify to the character of the information provided by any of the sources who may contribute such information for inclusion in the presentence report. The indicia of reliability which should be accorded a pre-sentence report surely is not above that of an indictment or some other legal documents. An indictment certainly has an indicia of

reliability; nonetheless, it requires much more than that indicia to justify the taking of a citizen's liberty.

III. UNDER THE MOST LENIENT AND INDULGENT EVALUATION, THE ASSISTANCE OF COUNSEL DEMONSTRATED A FAILURE OF HIS APPEAL ATTORNEY TO PROVIDE FUNDAMENTAL REPRESENTATION TO PETITIONER.

This case presents issues of fundamentally unacceptable representation by counsel. The Fifth Circuit has sought to use the cases of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and Lockhart v. Fretwell, - U.S. -, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) as justification to dismiss Petitioner's assertions of ineffective assistance of appeal counsel. Petitioner would strongly urge this Court that the Appellate Court was wrong and that, if left standing, that court's decision will further perpetuate an ongoing miscarriage of fairness and justice. Petitioner would also submit that he has, indeed, met both of the prongs (deficient performance and prejudice) of Strickland and the requirements (unreliability and unfairness) of Lockhart. In addition, this Court should review this case because it reaches deep and basic principles of adequate representation previously addressed by this Court in several cases which the Circuit Court has chosen to ignore. It appears that the Appellate Court rushed to use the first available cases to provide some amount of vindication for its illogical opinion.

It is obvious that the Appellate Court could not disagree with Petitioner's claim of deficient performance (the first prong of Strickland), so it simply decided to rely on a finding that Petitioner did not show prejudice (the second and most ambiguous prong). While many cases might allow for such division of these prongs, this one does not. Prejudice is clearly what resulted from the acts and/or omissions of coun-

sel in this case. In many instances during the trial and at sentencing, Petitioner's attorney demonstrated a competent knowledge of the law - including those brought into existence by the Sentencing Guidelines. He had made objections and had quoted or paraphrased statutes and sections of statutes and guidelines relevant to the procedures involved in this case. There appears to be no rational reason for counsel to falter on appeal. The Circuit Court should not, now, be allowed to provide a shield for counsel's inadequate appeal representation. It is this Court which recognized that,

> "[t]he need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertently passed over." (emphasis added) Penson v. Ohio, 488 U.S. 75, 85, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).

It is the manifest under-representation by appeal counsel and its affirmation by the Appellate Court which this Court should review and rectify.

Petitioner would assert to this Court that counsel's performance in effect left Petitioner in the position that the Court talked about in Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) when it said,

> "In bringing an appeal as of right from the conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal a criminal appellant must face an adversary proceeding that - like a trial - is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant - like an unrepresented defendant at trial - is unable to protect the vital interest at stake." (at page 396)

An abiding belief that any person (including Petitioner) who stands convicted and faces many years of imprisonment has is that his appeal counsel will address and present issues which should and must be raised. Constitutional, statutory, and procedural issues are all extremely important to the appellant. Omission of serious questions can leave an appellant in a double bind. First, he has not had his case properly placed before the court; and second, he is restricted in his ability to raise those issues later. The result, in any event, is that the appellant will often spend unconstitutional and unnecessary time incarcerated unless a remedy is provided. Petitioner is presently in that situation.

Because certain issues were not raised in the initial appeal, it is clear that they were not seriously considered by the lower courts. Petitioner believes that the Appellate Court gave little more than a cursory consideration to his appeal of the district court's denial of his Section 2255 Motion. The Appellate Court seems to have simply summarized the major thrust of Petitioner's issues and answered with general and sometimes unrelated citations and holdings. Petitioner would submit to this Court that had his Section 2255 Motion been filed in another circuit (the Eighth in particular) he would have received a favorable decision on the issues that were raised. The circumstances of this case clearly show that Petitioner was deprived of substantive and procedural rights by the deficient performance of counsel.

Specifically, Petitioner's appeal counsel:

1. failed to raise, on appeal, statutory and constitutional questions of the relevancy and reliability of the information contained in the pre-sentence report used for enhancement purposes;
2. failed to appeal the use of the pre-sentence report as the sole evidence for enhancement purposes;

3. failed to challenge the lack of notice that the court, in fact, was going to use the information in the pre-sentence report for enhancement purposes; and

4. failed to challenge the constitutionality of Section 1B1.3 U.S.S.G. (especially as used against Petitioner).

Counsel had objected to all of these on several occasions. See Def's Obj. to PreSen. Rpt. (Appendix D); Def's Supp. Memo. in Support of Obj. to PreSen. Rpt. (Appendix E); and the Sen. Tr. (Appendix F). Counsel even appeared confident of the applicable laws and procedures, and he was able to quote or paraphrase them at the times the objections were made. This makes it even more perplexing that counsel failed to raise these constitutional, statutory, and procedural questions for review on direct appeal. These were seemingly basic and fundamental issues which would have effected Petitioner's sentence greatly. Petitioner would urge this Court to review this case because it is clear that counsel failed to represent his client adequately; the district court erred in denying Petitioner's claim of ineffective assistance of counsel; the Circuit Court continued the miscarriage of justice by, in effect, sanctioning the errors; and Petitioner should not be forced to serve more time incarcerated because of those mistakes. This case presented unique and substantial issues which Petitioner had a right to have fairly heard.

IV. IF EITHER SECTION 1B1.3 OR SECTION 6A1.3, U.S.S.G., ALLOWS THE GOVERNMENT TO ASSERT CONDUCT AS BEING RELEVANT WITHOUT REQUIRING THE GOVERNMENT TO OFFER PROOF OR EVIDENCE PRIOR TO THE DEFENDANT HAVING TO PROVE INNOCENCE OR HAVING TO MOUNT ANY DEFENSE, IT (OR BOTH) IS UNCONSTITUTIONAL IRREGARDLESS OF STATUTORY SANCTION.

> "No person shall . . . be compelled in any criminal case to be witness against himself, nor be deprived of . . ., liberty . . . without due process of law . . .." Amend 5 U.S. Const.
>
> "In all criminal prosecutions, the accused shall enjoy the right . . ., to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence." Amend 6 U.S. Const.

Section 1B1.3, U.S.S.G. has indeed subverted the Constitution and the rights of citizens if it allows the use of conduct deemed relevant for enhancement purposes without the process which is fair and just as is required by the Constitution. The Fifth Circuit is wrong to put the burden of proving innocence before the government has to present evidence (not accusations) of guilt. To force a defendant to provide specific answers to simple allegations opens that defendant to unimaginable possibilities. It would force the defendant to provide information to the government which could then be used to either: (1) support its (the government's) allegations; (2) allege other conduct which could be considered relevant; or (3) both. This kind of benefit to the government is certainly (if forced on the defendant) forbidden by the Constitution.

Section 6A1.3 (a) and its commentary demonstrate the Sentencing Commission's concerns for fairness in the 'determination' of 'reasonably' disputed factors and an 'adequate opportunity' to settle them. If fairness is to be the rule, then a defendant's right to be informed of the nature and cause of the alle- gations, confronted with witnesses (and evidence) against him, or not to be a witness against himself should not be mitigated by the fact that charges are alleged through the sentencing process. The fundamental foundation upon which the 5th and 6th Amendments rest is the obligation and responsibility imposed on the government to present evidence in every situation before a citizen is required to respond (defend).

The Fifth Circuit has surely failed to comprehend the disastrous effect on the defendant's rights and the unmistakeable strategical advantages gained by the government if the defendant is forced to present evidence that conduct is not relevant prior to the government presenting anything but allegations of relevancy. Under the Constitution the sentencing process does not allow for statutory consent to subvert the rights of a citizen (even one already convicted) in this way. The use, by the Fifth Circuit, of either (or both) Section 1B1.3 or Section 6A1.3 to require a defendant to carry the initial burden of presenting proof or evidence of relevant conduct is unconstitutional.

Neither allegations, assertions, assumptions, nor guesses should require a response from a defendant until and/or unless the government offers proof or evidence of wrongdoing. To require a person convicted of a crime to produce or (more likely) attempt to produce evidence of innocence based on uncharged allegations, assertions, assumptions, or guesses under the pretense that process changes because it is being done in a sentencing phase misapplies the intent and authority of the Constitution.

By restricting the factors which courts can use to determine a sentence the Guidelines have effectively taken away many factors which a defendant could have used to try to mitigate a sentence; to require the defendant to now provide possible grist for the government's mill at sentencing is unreasonable as well as unjust.

The Circuit Court chose to decline to address the precise issues pertaining to the constitutionality of U.S.S.G. Section 1B1.3 presented by Petitioner. Instead, it simply held in a one sentence statement that, "in permitting the sentencer to consider uncharged conduct when determining a defendant's base level, 1B1.3 is not unconstitutional." United States v. Patten, 40 F.3d at p. 776. That holding spoke to only a small portion of the issues. Petitioner presented several issues which were unique and some issues which were unaddressed (even prior to Petitioner's case) by the Fifth Circuit. Questions such as - (1) Does the government have a responsibility to demonstrate that a prescription written for a patient was in fact used for illegal purposes since the prescription may not be considered unlawful unless it was, in fact, written for illegal purposes? (2) If a charge is dropped by the government because it cannot be proved to the jury, should it then be permitted to be used for enhancement purposes simply because the burden placed on the government is reduced? - are only two of the issues which were presented but not addressed.

CONCLUSION

The Fifth Circuit has rendered decisions which cause citizens convicted within its jurisdiction to suffer emphatically different process than other circuits would require. Moreover, the Fifth Circuit has sanctioned actions by courts below it which are in manifest variance with procedures provided for

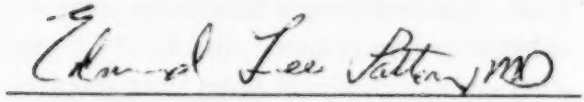
under U.S.S.G. section 6A1.3 and the Constitution. At the least, this case would have been viewed differently by several other appellate viewed differently by several other appellate circuits, and it would have been returned to the district court for proper procedure. Different process and proper procedure would have resulted in a very different sentence in this case.

The pre-sentence report was wrongly relied on as evidence by the district court. Ratification by the Circuit Court was in direct opposition to the holdings, rulings, and judgments of other circuits. It is clear that there are differences among the federal circuits concerning the use of the pre-sentence report. Fair and just sentencing procedure and result, in this case and others, call for some clarification of the proper use of the pre-sentence report by this Court.

What is crystal clear in this case is the fact that Petitioner received ineffective assistance of counsel at the original appeal stage. By his acts and/or omissions, Petitioner's appeal attorney waived substantial rights and issues which left Petitioner seriously prejudiced and the subsequent proceedings unfair and unreliable.

This Court should grant the Petition for a Writ of Certiorari so that the issues herein raised and those closely and inherently implicated may be settled. There are important areas of Constitutional and statutory law and procedure (especially as has been effected by the Sentencing Guidelines) which this Court should attempt to make more clear for courts (and lawyers) below.

Respectfully submitted by,



Edward L. Patten, M.D.
Inmate Number 49012-079
Federal Correctional Institution
Three Rivers, Texas 78071-4300

APPENDIX A

FIFTH CIRCUIT'S OPINION AFFIRMING
DISTRICT COURT'S DENIAL OF SECTION
2255 MOTION

UNITED STATES of America,
Plaintiff-Appellee,

v.

Edward L. PATTEN, M.D.,
Defendant-Appellant.

No. 94-20263
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Dec. 30, 1994.

Defendant was convicted of conspiracy to dispense controlled substances, unlawfully dispensing controlled substances, Medicaid fraud, and obstruction of justice, and convictions were affirmed, 956 F.2d 266. The United States District Court for the Southern District of Texas, David Hittner, J., denied defendant's habeas corpus petition, and defendant appealed. The Court of Appeals held that: (1) Sentencing Guidelines provision which permitted district court to consider uncharged conduct in determining defendant's base offense level was not unconstitutional, and (2) defense counsel was not ineffective for failing to appeal denial of motion for sentencing hearing, failing to challenge district court's reliance on information in presentence investigation report (PSR), or failing to argue on appeal that defendant received inadequate notice of information that district court intended to rely on to determine sentence.

Affirmed.

1. Criminal Law 997.2

Movant is barred from raising jurisdictional and constitutional claims for first time on collateral review unless movant demonstrates cause for failing to raise issue on direct appeal and actual prejudice resulting from error. 28 U.S.C.A. sec. 2255.

2. Criminal Law 997.2

Alleged errors other than jurisdictional or constitutional claims may not be raised on collateral review unless movant demonstrates that error could not have been raised on direct appeal and, if condoned, would result in complete miscarriage of justice. 28 U.S.C.A. sec. 2255.

3. Criminal Law 997.2, 997.5

Ineffective assistance of counsel satisfies cause and prejudice standard which allows movant to raise jurisdictional or constitutional claim for first time on collateral review. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. sec. 2255.

4. Criminal Law 1234

Sentencing Guidelines provision which permitted district court to consider uncharged conduct in determining defendant's base offense level was not unconstitutional. U.S.C.G. sec. 1B1.3, 18 U.S.C.A. App.

5. Criminal Law 641.13(6)

To establish ineffective assistance of counsel claim, defendant must demonstrate that counsel's performance was

deficient and that this deficient performance prejudiced defense. U.S.C.A. Const.Amend. 6.

6. Criminal Law 1147

Court of Appeals reviews denial of evidentiary sentencing hearing for abuse of discretion.

7. Criminal Law 1316

If defendant is given opportunity to review presentence investigation report (PSR) and file formal objections, denial of evidentiary sentencing hearing is not abuse of discretion.

8. Criminal Law 1316

Denial of defendant's motion for evidentiary sentencing hearing was not abuse of discretion where defendant received copy of presentence investigation report (PSR) and filed extensive objections, but provided no evidence supporting challenge to reliability of information in PSR.

9. Criminal Law 641.13(7)

Defense counsel was not ineffective for failing to appeal denial of motion for sentencing hearing on defendant's relevant conduct, absent showing of resulting prejudice. U.S.C.A. Const.Amend. 6.

[774]

10. Criminal Law 986.4(1)

Presentence investigation report (PSR) generally bears

sufficient indicia of reliability to permit district court to rely on it at sentencing.

11. Criminal Law 986.4(1)

Defendant bears burden of demonstrating that presentence investigation report (PSR) is inaccurate, an , in absence of rebuttal evidence, district court may properly rely on it; district court is free to disregard defendant's unsworn statements that PSR is unreliable.

12. Criminal Law 986.4(1)

District court did not err in relying on information in presentence investigation report (PSR) provided by Drug Enforcement Administration and Medicaid fraud investigator, in sentencing defendant for conspiracy to dispense controlled substances, unlawfully dispensing controlled substances, Medicaid fraud, and obstruction of justice, where defendant failed to provide district court with competent rebuttal evidence.

13. Criminal Law 641.13(7)

Defense counsel was not ineffective for failure to challenge district court's reliance on information in presentence investigation report (PSR); district court properly relied on information because defendant failed to provide court with competent rebuttal evidence, and defendant failed to demonstrate prejudice resulting from counsel's conduct. U.S.C.A. Const.Amend. 6.

14. Criminal Law 986.5

Defendant's receipt of copy presentence investigation report (PSR) was sufficient to give defendant notice of information that district court intended to rely on to determine defendant's sentence.

15. Criminal Law 641.13(7)

Defense counsel was not ineffective for failing to argue on appeal that defendant received inadequate notice of information that district court intended to rely on to determine sentence, as defendant received copy of presentence investigation report (PSR), which was sufficient for purposes of notice, and defendant failed to demonstrate prejudice. U.S.C.A. Const.Amend. 6.

Edward L. Patten, M.D., pro se.

James L. Powers, Paula C. Offenhauser, Asst. U.S. Attys., Gaynelle Griffin Jones, U.S. Atty., Appellate Div., Houston, TX, for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before DUHE, WIENER AND STEWART, Circuit Judges.

PER CURIAM:

In this appeal of the district court's denial of a federal prisoner's habeas corpus petition under 28 U.S.C. sec. 2255,

Defendant-Appellant Edward L. Patten raises issues on appeal concerning procedural bar to raising claims in a sec. 2255 motion that implicates the district court's refusal to grant an evidentiary hearing on his objections to facts set forth in his presentence investigation report (PSR), and failure to declare United States Sentencing Guideline (U.S.S.G.) sec. 1B1.3 unconstitutional. Patten also continues his insistence that he was denied effective assistance of appellate counsel. For the reasons set forth below, we reject Patten's contentions and affirm the district court's denial of Patten's habeas motion.

I

FACTS AND PROCEEDINGS

Patten was convicted of 89 counts of conspiracy to dispense controlled substances, unlawfully dispensing controlled substances, Medicaid fraud, and obstruction of justice. He was sentenced to a total of 84 months imprisonment, five years supervised release, a $100,000 fine, and a $4,450 special assessment. We affirmed his conviction. *United States v. Patten*, 956 F.2d 266 (Table) (5th Cir. Feb. 21, 1992) (unpublished).

Patten then filed the instant sec. 2255 motion, arguing that the district court erred by denying his motion for a sentencing hearing and by relying on the information in the PSR

[775]

to enhance his sentence; that U.S.S.G. sec. 1B1.3 is unconstitutional; and that he was denied effective assistance of appellate counsel. The district court denied habeas relief and

dismissed the motion, after which Patten timely filed a notice of appeal.

II

ANALYSIS

A. *Procedural Bar*

[1,2] A movant is barred from raising jurisdictional and constitutional claims for the first time on collateral review unless he demonstrates cause for failing to raise the issue on direct appeal and actual prejudice resulting from the error. *United States v. Pierce*, 959 F.2d 1297, 1301 (5th Cir.), *cert. denied*, - U.S. -, 113 S.Ct. 621, 121 L.Ed.2d 554 (1992). No other types of errors may be raised on collateral review unless the movant demonstrates that "the error could not have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice." *Id.* (internal quotations and citation omitted).

1. *Nonconstitutional Claims*

To the extent that Patten contends that the district court improperly denied his motion for an evidentiary hearing on his objections to the PSR, and improperly relied on the information in the PSR to determine his sentence---claims that clearly are not of constitutional dimension---Patten has not demonstrated that such claims could not have been raised on direct appeal. *See Pierce*, 959 F.2d at 1305. To the extent that Patten has raised such claims in the context of an ineffective assistance of counsel claim, however, they are addressed below.

2. *Constitutional Claims*

[3] Patten's claim that U.S.S.G. sec. 1B1.3 is unconstitutional is not procedurally barred. Patten alleges that his appellate counsel was ineffective for failing to raise the constitutional issue on direct appeal. Ineffective assistance of counsel satisfies the cause and prejudice standard. *Pierce*, 959 F.2d at 1301.

[4] Patten argues that sec. 1B1.3 is unconstitutional because it permits the district court to consider uncharged conduct to determine his base offense level. Although we have not addressed the precise issue raised by Patten, we have held that there is no constitutional violation if the district court includes the full quantity of drugs involved in the conspiracy and not just the quantity of drugs in the count of conviction. *United States v. Williams*, 22 F.3d 580, 582-83 (5th Cir.), *cert. denied*, - U.S. -. 115 S.Ct. 367, 130 L.Ed.2d 320 (1994). The Eighth Circuit has held that the consideration of uncharged conduct does not violate a defendant's constitutional rights if the government proves the conduct by a preponderance of the evidence. *United States v. Galloway*, 976 F.2d 414, 422-27 (8th Cir.1992), *cert. denied*, - U.S. -, 113 S.Ct. 1420, 122 L.Ed.2d 790 (1993); *see also McMillan v. Pennsylvania*, 477 U.S. 79, 84-93, 106 S.Ct. 2411, 2415-20, 91 L.Ed.2d 67 (1986) (Pennsylvania statute that required imposition of a minimum sentence upon finding of a visible weapon by a preponderance of the evidence, even if possession of a weapon is not an element of the offense, does not violate due process); *United States v. Deisch*, 20 F.3d 139, 147 n. 18 (5th Cir.1994) ("mere sentencing factors need not be submitted to the petit jury or proved by a reasonable doubt"). We hold that, in permitting the sentencer to consider uncharged

conduct when determining a defendant's base offense level, sec. 1B1.3 is not unconstitutional.

B. *Ineffective Assistance of Counsel*

[5] Patten contends that his appellate counsel provided ineffective assistance by failing to raise several sentencing issues on direct appeal. To establish an ineffective-assistance-of-counsel claim Patten must demonstrate that his counsel's performance was deficient and that this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Patten argues specifically that his attorney was ineffective for failing to appeal the denial of his motion for a sentencing hearing. After reviewing the PSR and submitting written

[776]

objections, Patten requested an evidentiary hearing to challenge the reliability of the information comprising his relevant conduct. In particular, he challenged the reliability of the information regarding uncharged conduct. The district court nevertheless denied the motion.

[6-9] We review the denial of an evidentiary sentencing hearing for abuse of discretion. *United States v. Henderson*, 19 F.3d 917, 927 (5th Cir.), *cert. denied*, - U.S. -, 115 S.Ct. 207, 130 L.Ed.2d 137 (1994). If a defendant is given an opportunity to review the PSR and file formal objections, denial of an evidentiary hearing is not an abuse of discretion. *Id.* Here, Patten received a copy of the PSR and filed extensive objections. Although he challenged the reliability of the information in the PSR, he never provided the district

court with any evidence supporting his bald allegations. The district court did not abuse its discretion by denying the motion, *see Henderson*, 19 F.3d at 927; and Patten has not demonstrated *Strickland* prejudice resulting from his appellate counsel's failure to raise the issue on appeal. *See Lockhart v. Fretwell*, - U.S. -, --, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993) (to establish prejudice Patten must show that counsel's errors were so serious as to render the proceedings unreliable and fundamentally unfair).

[10-13] Patten contends that his appellate counsel was also ineffective for failing to challenge the district court's reliance on the information in the PSR to determine Patten's guideline range. Generally, the PSR bears sufficient indicia of reliability to permit the district court to rely on it at sentencing. *United States v. Gracia*, 983 F.2d 625, 629 (5th Cir.1993). The defendant bears the burden of demonstrating that the PSR is inaccurate; in the absence of rebuttal evidence, the district court may properly rely on it. *Id.* at 630 n. 22. As noted, Patten made unsubstantiated allegations that the PSR information was inaccurate but never provided the district court with any competent rebuttal evidence. The Drug Enforcement Administration and a Medicaid fraud investigator were the sources of the information; and, in the absence of rebuttal evidence, the district court did not err in relying on that information. Patten has not demonstrated *Strickland* prejudice. *See Lockhart*, - U.S. at -, 113 S.Ct. at 844.

[14-15] Finally, Patten argues that counsel was ineffective for failing to argue on appeal that Patten received inadequate notice of the information that the district court intended to rely on to determine his sentence. But Patten received a copy of the PSR, and that is sufficient for purposes of notice. *See United States v. Gaudet*, 966 F.2d 959, 963 (5th Cir. 1992)

(information in the PSR is adequate to give defendant notice), *cert. denied*, - U.S. -, 113 S.Ct. 1294, 122 L.Ed.2d 685 (1993). Again, Patten has not demonstrated *Strickland*, prejudice. *See Lockhart*, - U.S. at -, 113 S.Ct. at 844.

AFFIRMED.

[777]

APPENDIX B

DISTRICT COURT'S DENIAL OF
SECTION 2255 MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. H-93-3750
EDWIN L. PATTEN, M.D.	)	
	)	
Defendant/Petitioner.	)	

ORDER

Pending before this Court is motion to vacate, set aside, or correct sentence (H-93-3750, Document #1, CR-89-183, Document #191) filed by petitioner Edward Lee Patten ("Patten") and a motion for summary judgment (CR-89-227, Document #196) filed by respondent United States of America ("the government"). Having considered the motions and the submissions of the parties in the civil action and underlying criminal action, the Court determines that Patten's motion to vacate should be denied.

Patten was tried before a jury and found guilty of the eighty-nine counts that were submitted to the jury of conspiracy, unlawful distribution of controlled substances by prescription, of making false statements in application for benefits under a state health care program, and one count of obstruction of a criminal investigation. On November 15, 1990, the Court assessed an eighty-four month term followed by five years supervised release. Patten appealed his

conviction to the Fifth Circuit on November 2, 1990 challenging the Court's denial of his motion to suppress evidence and the Court's admission of certain evidence against him, specifically, the testimony of co-conspirators' guilty pleas and

[1]

the terms of their respective agreements. The Fifth Circuit affirmed Patten's conviction on February 21, 1993.

Patten now seeks to collaterally attack his sentence pursuant to 28 U.S.C. sec. 2255. To obtain collateral relief, Patten "must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). Errors of law which may require reversal on appeal do not necessarily provide a basis for relief under section 2255. Id. (citing United States v. Addonizio, 442 U.S. 178, 184 (1979)); United States v. Wilcox, 640 F.2d 970, 973 (9th Cir. 1981). Rather, section 2255 is reserved for constitutional or jurisdictional error or errors that could not have been raised on direct appeal and would result in a complete miscarriage of justice. United States v. Shaid, 916 F.2d 984, 986-87 (5th Cir. 1990), cert. denied, 112 S. Ct. 978 (1992); United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. Unit A 1981).

In order to obtain relief for anerror to which no contemporaneous objection was made, the petitioner must show both "cause" excusing procedural default and "actual prejudice" resulting from the error. Shaid, 916 F.2d at 987 (citing Frady, 456 U.S. at 167-68). Claims of ineffective assistance of counsel, however, are excepted from the cause and prejudice standard and reviewed de novo. Id.

Patten raises the following issues in support of his motion: (1) the district court denied Patten a Rule 32 hearing at which he could have refuted information used to enhance his sentence; (2) the district court erred in using hearsay information contained in the presentence investigation report ("PSR") to

[2]

enhance Patten's sentence; (3) the district court erred in using relative conduct pursuant to United States Sentencing Guidelines section 1B1.3 to enhance Patten's sentence; and (4) Patten was denied his right to effective assistance of appellate counsel by counsel's failure to raise on appeal the issues set forth in allegations one through three above and for failing to appeal questions of statutory and constitutional errors.

Patten's first three complaints are procedurally barred. Although he filed a direct appeal from his conviction, Patten failed to raise these complaints in the Fifth Circuit. Non-constitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding. United States v. Pierce, 959 F.2d 1297, 1301 (5th Cir.), cert. denied, 113 S.Ct. 621 (1992). However, to the extent that these allegations are raised by Patten in the context of an ineffective assistance of counsel claim, they will be discussed below.

In order to prove prejudice due to alleged omissions by appellate counsel, a defendant must show a reasonable probability that he would have prevailed on appeal but for certain lapses of his attorney. Moss v. Collins, 963 F.2d 44, 47 (5th Cir. 1992), cert. denied, 113 S.Ct. 983 (1993). Patten

alleges he was entitled to challenge, pursuant to Rule 32, the relevant conduct used to calculate his base offense level and that his appellate counsel was ineffective for failing to pursue on appeal the district court's denial of a hearing. Patten additionally alleges that counsel should have pursued on appeal the district court's use of hearsay evidence and relevant, uncharged conduct in calculating Patten's

[3]

sentence.

Patten requested a Rule 32 hearing to test the reliability of the information in the PSR. The Court overruled the objections. Whether to hold an evidentiary hearing concerning objections to the PSR lies within the sound discretion of the district court. United States v. Pologruto, 914 F.2d 67, 69 (5th Cir. 1990). The PSR generally maintains sufficient indicia of reliability to be considered as evidence by the trial judge in making factual determinations pursuant to the Sentencing Guidelines. United States v. Gracia, 983 F.2d 625, 629-30 (5th Cir. 1993). It was Patten's burden to demonstrate that the information upon which the Court relied was materially untrue, inaccurate, or unreliable. Id. Patten failed to meet this burden. Patten did not raise this issue on appeal and he failed to show that had this issue been appealed, he would have prevailed but for certain lapses by his attorney. See Moss, 963 F.2d at 47.

Patten complains that the Court erred in relying upon hearsay evidence contained within the PSR to enhance his sentence. The sentencing court may consider any relevant evidence, including hearsay evidence, without regard to its admissibility at trial provided it has some indicia of

reliability. United States v. Singleton, 946 F.2d 23, 26 (5th Cir. 1991) cert. denied, 112 S.Ct. 1231 (1992). If the defendant objects to the facts contained within the PSR but provides no rebuttal evidence, the Court may adopt the PSR without more specific inquiry or explanation. Gracia, 983 F.2d at 629-30. Patten failed to provide any rebuttal evidence.

[4]

Patten complains that he did not receive sufficient notice of the Court's intent to consider uncharged relevant conduct in calculating his base offense level. However, Patten received the PSR recommending the calculations. Due process does not require that a defendant be given notice, advice, or a probable prediction of where within the statutory range his guideline sentence will fall. The district court may consider uncharged conduct in determining the guideline range. United States v. McCaskey, 9 F.3d 368 (5th Cir. 1993). The uncharged conduct may pre-date the charged offense. Id.

Finally, Patten argues that the Sentencing Guideline section 1B1.3 is unconstitutional as applied to him. Section 1B1.3 is statutorily authorized. Gracia, 983 F.2d at 629. Patten also argues ineffective assistance of counsel on appeal for his attorney failing to raise questions of statutory and constitutional errors on appeal. Patten has failed to show that but for an alleged omissions by his attorney, he would have prevailed on appeal. See Moss, 963 F.2d at 47.

Based on the foregoing, the Court

ORDERS that Patten's motion to vacate, set aside, or correct

sentence (H-93-3750, Document #1, CR-89-183, Document #191) is Denied. It is further ORDERED that the government's motion for summary judgment (CR-89-183, Document #196) is GRANTED.

[5]

SIGNED at Houston, Texas, on this the 31 day of January, 1994.

DAVID HITTNER
United States District Judge

[6]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. H-93-3750
EDWIN L. PATTEN, M.D.,	)	
	)	
Defendant/Petitioner.	)	

FINAL JUDGMENT

As the petitioner's motion to vacate, set aside, or correct sentence (Document #1) has been denied, the Court hereby

DISMISSES petitioner's section 2255 motion.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 31 day of January, 1994.

DAVID HITTNER
United States District Judge

APPENDIX C

FIFTH CIRCUIT'S OPINION AFFIRMING ORIGINAL CONVICTION

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2939

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD L. PATTEN, M.D.,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(H-89-183-S-01)

(February 21, 1992)

Before REYNALDO G. GARZA AND GARWOOD, Circuit Judges, and Mahon*, District Judge.**

GARWOOD, Circuit Judge:

Defendant-appellant Edward L. Patten, M.D. (Patten), was convicted, after a jury trial, of eighty-nine counts of

conspiracy to dispense controlled substances, unlawfully dispensing controlled

---

* Senior District Judge of the Northern District of Texas sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

substances, Medicaid fraud, and obstruction of justice. Prior to the trial, Patten moved to suppress evidence obtained through the execution of three search warrants on the grounds that the warrants were overbroad. The court denied his motion to suppress. After a four-week jury trial, Patten was found guilty and was subsequently sentenced to concurrent terms of imprisonment for 84 months, concurrent supervised release terms of 3 and 5 years, a fine of $100,000, and a special assessment of $4,450. Patten timely filed a notice of appeal, and now argues that the district court erred in not granting his motion to suppress, that guilty pleas of Patten's co-conspirators were improperly admitted, and the prosecutor improperly bolstered the testimony of Patten's co-conspirators. We affirm.

Facts and Proceedings Below

Patten was a successful Houston physician in private practice specializing in general surgery and surgical nutrition.

During an audit of a Houston pharmacy, diversion investigator Clyde Hull (Hull) of the Drug Enforcement Administration (DEA) noticed that Patten had written an unusually large number of prescription for Talwin and PBZ, prescriptions drugs that are commonly sold as "sets" on the street and abused by drug users. During this same time period, Officer Sam Searcy (Searcy) of the Houston Police Department received a complaint from David Akpokip, a pharmacist at a different Houston pharmacy, that Patten was writing an unusually large number of prescriptions for Schedule II controlled substances, in particular Tuinal. These prescriptions were always picked up by the same woman, later identified as Maggie Bullard

[2]

(Bullard), a co-defendant in this case. Concerned that prescription pads had been stolen from Patten, Searcy phoned Patten about several of the prescriptions. Patten, however, verified that he had written the prescriptions.

During the course of the investigation, agents discovered that Patten was writing large amounts of prescriptions for Schedule II drugs at several other pharmacies. Additionally, investigators learned that Patten was authorizing prescriptions for Schedule II drugs that had been presented to pharmacies by Medicaid recipients. The pharmacists would call Patten's office for verification, and Patten would approve the prescriptions as written. Several of these "patients" testified at trial that they had never met Patten.

The investigation eventually unveiled two separate conspiracies. In the first, Maggie Bullard, a codefendant, would purchase prescriptions for Talwin and PBZ from Patten

for approximately $100 per prescription. Most of these prescriptions were issued in the names of people that Bullard lived with and took care of. Alfred McNeal (McNeal) would drive Bullard to Patten's office and to pharmacies to have the prescriptions filled. McNeal testified at trial that he watched Patten write out prescriptions and put the money Bullard gave him in his boot.

In the second conspiracy, Amos Oladimeji (Oladimeji), who originally saw Patten for hip pain, began purchasing Talwin from Patten and selling the drugs on the street. At some point, Olademeji complained that he was not making a profit. Patten suggested using other people's Medicaid cards. Patten would leave blank the patient's name and address on the prescription form that

he signed, and Oladimeji would fill it in with the name of a Medicaid recipient. Oladimeji would call Patten and let Patten know what names were being used so Patten could verify the prescriptions. Oladimeji would then borrow, or offer to pay for the use of, other people's Medicaid cards.

Law enforcement officials eventually located Oladimeji. Oladimeji agreed to arrange two meetings with Patten and wear a body microphone. During the meetings, Patten discussed the investigation with Oladimeji and asked Oladimeji to lie and tell the authorities that Oladimeji had stolen the prescriptions from Patten's office. Oladimeji asked for $10,000 in exchange for lying. Patten offered $2500 and promised to take care of Oladimeji's family.

Based on information gathered during the investigation, a

search warrant was issued for each of Patten's three offices. The warrants specified that the documents to be seized had to fall within a long list of business records of the type kept by a physician and had to relate to "the commission of a criminal offense." Pursuant to the warrants, searches were conducted at Patten's three different offices in Houston. Among the materials seized were patient sign-in sheets, patient medical files, and physician copies of prescriptions.

Before trial, Patten moved to suppress the evidence seized during the searches because the warrants failed to describe the items to be seized with sufficient particularity. The trial court denied the motion, apparently without giving reasons in support of its ruling.

[4]

At trial, Patten took the stand in his defense. He testified that Oladimeji was a handyman who did odd jobs for him and was entrusted with free rein of the office. Patten explained that he would sign prescriptions in advance for drugs he prescribed frequently, and theorized that Oladimeji had stolen bunches of these prescriptions. Patten also testified he treated many of Bullard's friends and that he had prescribed drugs for Bullard's friends during that course of treatment. He also stated that pharmacists did not routinely verify prescriptions with his office.

After a four-week trial, Patten was found guilty of the 89 counts that were submitted to the jury. Patten was convicted and sentenced to a total of 84 months' imprisonment on each count, to run concurrently, a $100,000 fine, $6781.45 in restitution, and a $4450 special assessment. Patten timely filed a notice of appeal.

Discussion

A. Motion to Suppress

Patten challenges the district court's denial of his motion to suppress. The district court denied Patten's Motion without entering findings of fact or indicating any legal theories in support of its ruling. In such a situation, we generally uphold the result reached by the trial court if there is any reasonable view of the evidence to support it. *See United States v. Yeagin*, 927 F.2d 798, 800 (5th Cir. 1991) ("Since the district court entered no factual findings and indicated no legal theory underlying its decision to admit the evidence obtained in the

consent search, we must independently review the record to determine whether any reasonable view of the evidence supports admissibility."); *United States v. Bethea*, 598 F.2d 331, 333-34 (4th Cir.) ("When, as in this case, a district court denies a motion to suppress evidence, without making or being requested to make findings of fact, the result will be upheld on appeal if any reasonable view of the evidence, looked at in the light most favorable to the government, will sustain the denial."), *cert. denied*, 100 S.Ct. 124 (1979); *United States v. Montos*, 421 F.2d 215, 219 n.1 (5th Cir.) ("Since findings were not made, we uphold the ruling of the Trial Court if there is any reasonable view of the evidence to support it."), *cert. denied*, 90 S.Ct. 1262 (1970).

Patten argues that the warrants used in the search of his offices were not sufficiently particular regarding the things to be seized.[1] The Fourth Amendment requires that a warrant

1 Each of the search warrants Patten challenges authorized the seizure of:

> "property that constitutes the commission of a criminal offense. All patient records for the patients as indicated in the Attachment "A", and incorporated by the reference here-in for all purposes, including but not limited to: 1) Medicaid files, 2) Billing Statements, 3) insurance claims, 4) Computer generated records, 5) Calenders [sic], 6) Sign-in records, 7) Patient information forms, and referral information, 8) Appointment records, and 9) any other pertinant [sic] patient records. All business records for the periods of May 23, 1985 through the present, including but not limited to: 1) All Triplicate Prescription Records, 2) Copies of prescription Records, 3) Tax returns, 4) Telephone records, 5) Bank records, 6) Employee records, 7) Insurance claims, 8) Medicaid records, 9) Daily accounting sheets, 10) Computer generated records, and 11) Any other pertinant [sic] business records."

"particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. 4; *see Maryland v. Garrison*, 107 S.Ct. 1013, 1016 (1987). "A general order to explore and rummage through a person's belongings is not permitted." *United States v. Cook*, 657 F,2d 730, 733 (5th Cir. 1981). However, not all warrants that use generic terms are overbroad: "Assuming that probable cause has been shown, the warrant may be sufficient with only a generic description." *Id.* This Court has cautioned that "[t]he use of a generic term or a general description in a warrant, however, is acceptable to the judicial officer issuing the warrant only when a more specific description of the things to be seized is unavailable." *Id.*

The warrants at issue in this case were not obviously overbroad. First, the property to be seized was described as

"property that constitutes the commission of a criminal offense." Even though the warrant did not set out the criminal offense, the accompanying affidavit specified that "probable cause exists to search both Dr. Edward Lee Patten's offices for evidence of violations of 21 U.S.C. sec. 841(a) (1) and other controlled substance violations." Thus, the materials to be seized were limited in that they had to relate to controlled substance violations. Second. the warrants limited the kind of records to be seized. The warrants listed two groups of materials to be seized--specific types of patient records and business records. The patient records were further limited in that the warrant only authorized seizure of the records of twenty-eight patients listed by name in an attachment. The scope of the search of business records was narrowed by only

[7]

authorizing the seizure of records for the period "May 23, 1985 through the present [July 11, 1988]." Given these parameters, the warrants at issue were not clearly overbroad under this Court's jurisprudence. *See United States v. Cantu*, 774 F.2d 1305 (5th Cir. 1985) (per curiam), *cert. denied*, 107 S.Ct. 169 (1986); *see also United States v. Hayes*, 794 F.2d 1348 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 1289 (1987).

We need not conclusively decide, however, whether the warrant was overbroad because suppression is inappropriate under the good-faith exception to the exclusionary rule of *United States v. Leon*, 104 S.Ct. 3405 (1985). In *Leon*, the Supreme Court ruled that suppression "cannot logically contribute to the deterrence of Fourth Amendment violations" if an officer acted in objectively reasonable belief that the warrant had been properly issued. *Leon*, 104 S.Ct. at 3418-19 (footnote omitted). This Court has applied the good faith

exception of *Leon* to contentions that a warrant violated the particularity clause of the Fourth Amendment. *See United States v. Gordon*, 901 F.2d 48, 50 (5th Cir.), *cert. denied*, 111 S.Ct. 510 (1990) (quoting 2 W.LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* 207 (1987), for the proposition that because of *Leon* "whether the description in the warrant *in fact* was constitutionally adequate is no longer determinative on the suppression issue"). The good faith exception does not apply, however, if the warrant is so facially deficient as to preclude objectively reasonable on it by the officers. *Id.*; *see also Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989).

[8]

Where, as here, at least a colorable argument can be made that the warrant is not overbroad, it is not plausible to argue that the warrant is deficient enough to preclude objectively reasonable reliance on it. Furthermore, even though it is not clear whether the affidavit was physically attached to the warrant, "the possession of the affidavit when the officers conduct their search, for example, is evidence of good faith under *Leon*." *United States v. Luk*, 859 F.2d 667, 677 (9th Cir. 1988). In this case, diversion investigator Hull, upon whose affidavits the warrants were issued, was the agent in charge when the warrants were executed and completed the returns. Although the record does not indicate whether the affidavits were at the offices when the warrants were executed, it appears that Hull and the other agents that executed the warrants relied on the affidavits in determining what items to seize. The returns do not indicate that any items were seized other than those authorized in the more particularized affidavits. The absence of any contention that the officers seized any items other than those relating to

transactions described in the affidavits indicates that the agents relied on the more particular affidavits. In light of the officers' reliance on the accompanying affidavits, we hold that the warrants, construed in conjunction with the affidavits, were not so facially overbroad as to preclude reasonable reliance by the executing officers.

B. Guilty Pleas of Patten's Co-conspirators

Patten complains that the district court erred in allowing the government to refer at four separate times during the trial (voir dire, opening statement, and direct examination of Oladimeji and

[9]

McNeal) to the guilty pleas, pursuant to plea bargains, of co-conspirators who agreed to testify for the prosecution. "Although a co-defendant's plea cannot be used to establish the guilt of the defendant, the plea can be used for other purposes such as impeaching the credibility of the co-defendant as a witness." *United States v. Casto*, 889 F.2d 562, 567 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 1164 (1990) (citation omitted). We have held that "a witness-accomplice's guilty plea may be brought out at trial provided that (1) the evidence serves a legitimate purpose and (2) the jury is properly instructed about the limited use that they may make of it." *United States v. Valley*, 928 F.2d 130, 133 (5th Cir. 1991). Whether such evidence is admissible is within the broad discretion of the district court. *United States v. Black*, 685 F.2d 132, 135 (5th Cir.), *cert. denied*, 103 S.Ct. 387 (1982).

The first issue we must address is whether the prosecutor

had a legitimate reason for introducing the guilty pleas at trial. It is well-established that a "legitimate reason exists when the record reflects a defensive strategy to emphasize or rely on a co-conspirator's guilt." *United States v. Valley*, 928 F.2d 130, 133 (5th Cir. 1991). It is thus permissible to "'blunt the sword' of anticipated impeachment by revealing the information first." *United States v. Marroquin*, 885 F.2d 1240, 1246 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 1807 (1990). It is evident that the government had such a proper purpose in discussing the guilty pleas at trial. In objecting to the prosecutor's reference to Oladimeji's guilty plea during opening statement, the defense stated "I think that's an option that belongs to the defense, if it

[10]

ever is developed, I object to the government referring to it." The defense never precluded use of the guilty pleas during trial. Indeed, during cross-examination, the defense relied extensively on the guilty plea to attack the credibility of Oladimeji. Accordingly, we find that a legitimate purpose existed for the prosecutor's use of the guilty pleas on direct examination.

The second issue we must address is whether the district court properly instructed the jury regarding the guilty pleas. In the instant case, the district court twice instructed the jury that evidence about accomplices' guilty pleas could only be used for assessing credibility and not as substantive evidence of Patten's guilt. "A cautionary instruction is generally sufficient to dispel any prejudice that arises from informing the jury of a codefendant's plea of guilty." *United States v. De Lucca*, 630 F.2d 294, 298 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 1520 (1981).These instructions, however, were not

given immediately after the jury learned of the guilty pleas.[2] This Court has recommended that

---

2 During voir dire, the prosecutor asked a question regarding plea bargaining in general. Patten's attorney objected to the question about plea bargains in general, and the district court overruled the objection. The district court then proceeded to question the panel regarding plea bargains in general. Patten's attorney did not request a limiting instruction. The prosecutor next mentioned Oladimeji's plea bargain during opening statement, to which the defense objected. The district court cautioned the jury that they were "to consider it only as a statement of the attorneys, not as any evidence of anything." The next mention of the guilty pleas was during the prosecutor's direct examination of McNeal. Patten's counsel objected and asked the court to instruct the jury to wholly disregard. The court overruled the objection. The defense never requested a limiting instruction. Before proceedings started the next morning, and after several intervening witnesses had testified, the prosecutor requested a limiting instruction, which the district court agreed to give. The district court instructed the jury that:

"when a jury learns of a co-defendant's guilty plea, the trial judge should immediately admonish them against transferring the guilt of one to another." *Id.*

A failing to immediately instruct the jury is not necessarily fatal, however. In *DeLucca*, we also recognized that if defense counsel did not request a limiting instruction, the failure of the judge to give one does not require reversal. *Id.* at 299. In the instant case, when the prosecutor mentioned the guilty pleas during voir dire and opening statement, the defense counsel objected, but did not request a limiting instruction; Patten should not now be able to complain that a limiting instruction was not given immediately after those two references to the guilty pleas. Furthermore, this Court has apparently approved giving a limiting instruction at the end of trial with the remainder of the jury instructions. In *United States v. Borchardt*, 698 F.2d 697 (5th

---

"[A]ll pleas of guilty of other individuals related to this case of some offense relating to these facts is not any evidence with respect to this defendant in this case nor any element of any violation which with [sic] this defendant is charged. The evidence was admitted before you relative to the backgrounds of these other individuals so that you can weigh those witnesses credibility and believability .... But the bottom line is, you are not to consider anything that these other witnesses may have done relative to their pleas, if any, in anything related to this case and hold it against this defendant."

The district court did not give a further cautionary instruction (prior to the close of the evidence) after the prosecutor questioned Oladimeji regarding his guilty plea. However, in its charge to the jury before closing arguments, the district court cautioned the jurors "that you are to draw no conclusions or inferences of any kind about the guilt of defendants on trial from the fact that prosecution witnesses pled guilty to similar charges."

Cir. 1983), we approved a general instruction given by the trial court (apparently after both sides had rested) to the effect that "those convictions of men that were involved in this case, of some offense relating to these facts, again is not any evidence with respect to this defendant in this case, nor any element of any violation with which this defendant is charged," stating that "[t]he law requires no more." *Id.* at 701.

Given that a legitimate purpose existed for the prosecutor's use of the bargained guilty pleas and that the district court gave effective limiting instructions informing the jury that the guilty pleas were not to be used as substantive evidence of Patten's guilt, we conclude that the district court did not abuse its discretion when it permitted the government to introduce the co-conspirators guilty pleas at trial.

C. Improper Bolstering

Patten's third point of error is that the prosecutor's questioning of the co-conspirators regarding their plea agreements was error because it improperly bolstered their testimony. Patten presents three separate arguments in this respect. First, he argues that the prosecutor's questioning of the co-conspirators regarding the truth-telling provisions of their plea agreements constituted an improper bolstering of their testimony. Second, Patten contends that the government, in stating that "you are not going to be sentenced until after you've testified, and then the judge will get to decide whether or not you have told the truth," improperly implied that one of the co-conspirators must be telling the truth out of a fear that the plea agreement would be withdrawn.

Patten's third argument is that the government improperly insinuated that extrinsic information, namely grand jury testimony and the statements of other witnesses, supported the testimony of a co-conspirator.

1. *Agreement to testify truthfully*

A few federal courts, namely the Second Circuit, have concluded that it is improper for a prosecutor to inquire on direct examination into bolstering aspects of a plea agreement such as the promise to testify truthfully. *See United States v. Cosentino*, 844 F.2d 30 (2d Cir.), *cert. denied*, 109 S.Ct. 303 (1983). "The majority of circuits [however] allow the government to admit evidence of truthfulness provisions of an agreement on direct examination of a witness, prior to any challenge to the witness's credibility." *United States v. Lord*, 907 F.2d 1028, 1029 (10th Cir. 1990) (citing *United States v. Edelman*, 873 F.2d 791, 795 (5th Cir. 1989)). The Fifth Circuit follows this majority rule. *See United States v. Edelman*, 873 F.2d 791, 795 (5th Cir. 1989) ("Admission of a plea agreement wherein the witness has agreed to testify truthfully or face prosecution for perjury is not impermissible bolstering of the witness."); *United States v. Martino*, 648 F.2d 367, 389 (5th Cir. 1981) ("The statement in the plea agreement that Noriega promised to testify 'truthfully' does not constitute error-laden vouching for the credibility of a government witness."), *on reconsideration United States v. Holt*, 650 F.2d 651, *cert. denied sub nom., Russello v. United States*, 102 S.Ct. 2006 (1982). Thus, under the established law in this Circuit, the government did not improperly bolster the testimony of

its witnesses by questioning them regarding the provisions in the plea agreements that they would tell the truth.

2. *Understanding of penalty for the telling the truth*

Patten's second argument is that the government improperly vouched for McNeal's credibility by asking him if he understood that the judge in sentencing McNeal would decide if McNeal had told the truth. This argument is analogous to that made in *United States v, Leslie*, 759 F.2d 366, 378 (5th Cir. 1985), *on rehearing*, 783 F.2d 541 (1986), *vacated on other grounds*, 107 S.Ct. 1267 (1987), where a defendant claimed that the government's admission into evidence of plea agreements that provided that the witnesses were subject to perjury charges if they breached the agreement was improper vouching. We held that "[a] witness's written acknowledgement of his understanding of the penalty for testifying falsely obviously is not an improper vouching for the credibility of the witness's testimony." *Id.* We similarly find here that the prosecutor did not improperly vouch for McNeal's credibility by orally inquiring whether McNeal understood that testifying falsely had consequences.

3. *Testimony supported by extrinsic evidence*

During redirect examination of Oladimeji, the prosecutor asked Oladimeji, one of the co-conspirators: "And you know I have this Grand Jury testimony to see what you're saying here in front of this jury, right? . . . And you know I have other witnesses statements to see what you are saying in front of this jury, right?" After Oladimeji had answered each question and the government had passed the witness, Patten's attorney objected on

the grounds of relevance and requested an instruction to disregard, which the court denied.[3] Patten argues that because neither the grand jury testimony nor the witness statements were placed in evidence,[4] this questioning constituted improper vouching because it suggested that "the witness should be believed because the government had by other means independently verified his testimony." See *United States v. Binker*, 795 F.2d 1218, 1225 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 1287 (1987).

Under tour jurisprudence, these two questions constituted error. *See Leslie*, 759 F.2d at 378; *Gradsky v. United States*, 373 F.2d 706 (5th Cir. 1967).

> "An attempt to bolster a witness by vouching for his credibility ordinarily is improper and constitutes error. The test for improper vouching is whether the prosecutor's expression might reasonably have led the jury to believe that the prosecutor possessed extrinsic evidence, not presented to the jury, that convinced the prosecutor of the defendant's guilt." *Leslie*, 759 F.2d at 378 (citation omitted).

---

3 It is not clear that Patten's attorney objected promptly enough to the prosecutor's question regarding grand jury testimony to properly preserve error: Patten's attorney waited until after Oladimeji had answered not only the first question, but also the second to object, by which time the government had passed the witness. For purposes of this appeal, we assume without deciding that Patten's attorney's objection did preserve any error that occurred.

4 It is unclear whether seven witness statements--presumably those referred to--were admitted into evidence. The exhibit list included in the record and apparently maintained by the courtroom deputy indicates that

seven witness statements, including statements by Oladimeji and McNeal, were marked, offered, and admitted into evidence. After a thorough review of the trial transcript, however, we cannot find an offer of these exhibits by the prosecutor or an admission into evidence by the district court. We hence assume that they were not admitted into evidence.

[16]

In *Gradsky*, we held that a statement by the prosecutor to the jury improperly bolstered the credibility of the government witnesses and required reversal. In *Gradsky*, the prosecutor told the jury that:

> "[T]he government representatives don't put a witness on the stand unless there appears to be some credibility, until he appears to be a truthful witness.
>
> "Certainly, the government ha[d] every opportunity to check out and to judge the credibility and truthfulness of [its witnesses] in this case, and in that context, we offered you [the jurors] their testimony." *Gradsky*, 373 F.2d at 710 (emphasis omitted).

Under the test announced in *Leslie*, the questions by the prosecutor in the instant case were error. The prosecutor improperly implied that the grand jury testimony and witness statements--matters not in evidence--verified Oladimeji's testimony.

While it was error for the prosecutor to refer to the grand jury testimony and other witnesses' statements in questioning Oladimeji, we do not find this error to require reversal under the facts of this case, and particularly the overwhelming other evidence of Patten's guilt. Improper questioning is reversible error only if the statement "'impair[s] a substantial right of

the objecting party.'" *Winter v. Brenner Tank, Inc.*, 926 F.2d 468, 473 (5th Cir. 1991) (quoting *Dixon v. International Harvester Co.*, 754 F.2d 573, 585 (5th Cir. 1985)). Additionally, "To warrant a new trial prosecutorial misconduct in the form of improper comment or questioning 'must be so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *United States v. Lichenstein*, 610 F.2d 1272, 1281 (5th Cir.) (quoting *United States v. Blevins*, 555 F.2d 1236, 1240 (5th Cir. 1977), *cert. denied*, 98

S.Ct. 733 (1978)), *cert. denied sub nom. Bella v. United States*, 100 S.Ct. 2991 (1980)). Appellate courts should not set aside a conviction if the prosecutor's conduct "did not in fact contribute to the guilty verdict and was, therefore, legally harmless." *United States v. Cardenas*, 778 F.2d 1127, 1130 (5th Cir. 1985) (quoting *United States v. Beckett*, 706 F.2d 519, 520 (5th Cir. 1983)).

In the instant case, the improper questioning was limited to two brief questions at the close of the prosecutor's redirect examination of Oladimeji and was not mentioned at any other time during the four-week trial. The prosecutor's misconduct does not appear to have permeated the entire atmosphere of the trial. Furthermore, we are not convinced that these two questions contributed in any way to the jury's returning a guilty verdict. Although we recognize that Oladimeji was in some respects an important witness for the prosecution, we are convinced, after a careful review of the record, that there was more than enough evidence to convict Patten without Oladimeji even taking the stand, and that such other evidence was strongly persuasive of Patten's guilt. McNeal testified that he had been present when Bullard had purchased

prescriptions from Patten and that he had himself purchased prescriptions from Patten. Several pharmacists testified that they had called Patten routinely and Patten verified that Medicaid recipients were indeed his patients. Patten did not have patient files for most of these Medicaid recipients, and many of these Medicaid recipients testified that they had never seen Patten. Finally, diversion investigator Hull testified that he had

[18]

overheard the conversations between Oladimeji and Patten while Oladimeji was wearing a microphone. During the conversation Patten offered Oladimeji $2500 to testify that Oladimeji had stolen the prescriptions. In light of the very strong evidence against Patten, we conclude that the improper questioning was legally harmless because there is no reasonable likelihood that it contributed to the guilty verdict.

Conclusion

Having found that the issues raised by Patten on appeal present no reversible error, we accordingly affirm his conviction and sentence.

AFFIRMED

[19]

APPENDIX D

DEFENDANT PATTEN'S OBJECTIONS TO PRESENTENCE REPORT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA)

VS) CRIMNAL NO. H-89-183-S (01)

EDWARD L. PATTEN, M.D.)

DEFENDANT PATTEN'S OBJECTIONS TO PRESENTENCE REPORT

TO THE HONORABLE DAVID HITTNER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION:

COMES NOW, EDWARD L. PATTEN, M.D., a Defendant in the above-entitled and numbered cause, by and through his attorney of record, Michael Ramsey, and respectfully submits the following objections to the Presentence Report filed in this case:

1. Paragraph 52, which can be found on page 15 of the Presentence Report, contains documentation relative to the drugs which were allegedly dispensed and distributed by Dr. Patten during the course of the conspiracy. Two of these drugs, namely, Biphethamine and Preludine, are not alleged in the indictment as having been illegally distributed. Nor was there any testimony at trial to indicate that Dr. Patten had illegally prescribed either of these drugs. Moreover, it appears that the amount of Talwin NX has been greatly exaggerated. Paragraph 67 of the Presentence Report alleges that Dr. Patten had written prescriptions for Biphethamine

and Preludine totalling 45.62 grams of heroin equivalency. It is also alleged that Dr. Patten dispensed 10,328 dosage units of Talwin NX in excess of that which was charged in the indictment and proven at trial. The Government contends that this information constitutes "Relevant Conduct" pursuant to

[1]

Section 1B1.3 of the Sentencing Guidelines and should therefore be considered in computing the total amount of controlled substances dispensed. The Defendant respectfully submits that this is not the case.

In applying the Guidelines to determine the total offense level, a trial court must first determine the "base offense level" by resorting to the guideline section of Chapter Two most applicable to the statute of conviction. The court must next apply any appropriate adjustments to the offense level under the victim, role, and obstruction provisions contained in Chapter Three. In the case of multiple counts of conviction, these steps are repeated for each count. Part D of Chapter Three is then utilized to determine the "combined offense level" for all the counts of conviction. It should be observed that no provision of Chapter Three allows the grouping together of counts of conviction with conduct that has never been charged. Indeed, in United States v. Restrepo, 883 F.2d 781, 782 (9th Cir. 1989), the Court of Appeals affirmatively held "that conduct that does not result in a criminal conviction should not be considered under the Multiple Counts section in fixing the appropriate guidelines range for a narcotics offense." The Defendant therefore contends that only those drugs for which he was actually convicted of having illegally dispensed should be considered

in determining an appropriate basic offense level. The Defendant would respectfully offer the

[2]

following table and referenced exhibit as an appropriate aggregation of the drugs involved:

DRUG	NET WEIGHT	TOTAL DOSAGE UNIT
Talwin NX	.200 grams	2,000 *
Tuinal	.340 grams	590
Seconal	.270 grams	30
Dexedrine	.260 grams	150

Converting each drug to their respective heroin equivalency yields the following:

Talwin NX	.05 grams
Tuinal	.4012 grams
Seconal	.0162 grams
Dexedrine	7.8 grams
TOTAL	**8.2675 grams of heroin equivalency**

* See Exhibit "A"

2. In paragraph 54, the Presentence Report states that the Texas Department of Human Resources, Medicaid Division, sustained of a loss of $69,623.24 as a result of Dr. Patten's illegal activity. However, the checks from the Comptroller's Office, which ostensibly represent the amount paid for the medicaid claims, total approximately $34,680.00. The

Defendant therefore objects to paragraph 54 of the Presentence Report.

3. The total amount of controlled substances dispensed by Dr.

[3]

Patten during this conspiracy totals 8.2674 grams of heroin equivalency. This translates to a base level offense of 14.

14

4. Specific offense characteristics: None.

0

5. Adjustment for Role in the Offense: The evidence indicates that the Defendant, along with Maggie Bullard and Amos Oladimeji, was a manager or supervisor of the alleged criminal activity. Contrary to paragraph 70 of the Presentence Report, the Defendant should not be characterized as a organizer or leader as it uncontroverted that Amos Oladimeji approached Dr. Patten after having discovered that prescriptions could be sold for profit. Amos Oladimeji testified that Diamond Lockett was, in fact, one of the principle people involved in teaching him how to accomplish the alleged Medicaid fraud. Similarly, Maggie Bullard was responsible for managing and supervising the actual dispensation of the narcotics. Therefore, pursuant to Section 3B1.1(b), the Defendant contends that, at the most, only a three level increase should be applied.

+3

6. Victim Related Adjustment: None. **0**

7. Adjustment for Obstruction of Justice: The Defendant has no objection to paragraph 72 of the Presentence Report. Therefore, Pursuant to Section 3C1.1 of the Guidelines, the

offense level should be increased by 2. +2

8. Adjusted Offense Level for Group 1 (Subtotal): 19

9. As to Group 2, the Defendant has no objection to Paragraph 75 of the Presentence Report. The base offense level pursuant to Section 2F1.1 is 6. 6

10. Specific Offense Characteristics: The Defendant contends, contrary to paragraph 76 of the Presentence Report, that the offense conduct resulted in a loss to Medicaid of approximately $34,600. Pursuant to Section 2F1.1(b)(1)(E), a four level should be added to the base offense. +4

11. The Defendant has no objection to paragraph 77 of the Presentence Report. Pursuant to Section 2F1.1(b)(2), the offense level should be increased by 2. +2

12. Adjustment for Role in the Offense: the Defendant would respectfully reiterate those contentions contained in paragraph 5 of these objections and assert that pursuant to Section 3B1.1(b), only a three-level increase should be applied. +3

13. Victim Related Adjustment: None. 0

14. Adjustment for Obstruction of Justice: The Defendant has no

objection to paragraph 80 of the Presentence Report. Consequently, pursuant to Section 3C1.1, the offense level should be increased by 2. **+2**

15. Adjusted Offense Level for Group 2:
(Subtotal) **17**

Multiple Count Adjustment

16. Adjusted Offense Level for Group 1:
19 = 1 Unit

17. Adjusted Offense Level for Group 2:
17 = 1 Unit

18. Total Units: **2.0 Units**

19. Increase in Offense Level Based on Total Units:
2

20. Highest of the Adjusted Offense Levels:
19

21. Combined Adjusted Offense Level: **21**

22. Adjustment for Acceptance for Responsibility: The Defendant respectfully objects to the Presentence Report in that it applies no adjustment for the acceptance of

responsibility. In United States v. Reed, 882 F.2d 147 (5th Cir. 1989), the Court of Appeals, quoting Section 3E1.1b, stated that a defendant may be given consideration for his acceptance of responsibility without regard to whether the conviction is

[6]

based upon a guilty plea or a finding of guilt by a jury. The Defendant therefore contends that he has indeed manifested a sincere contrition and that a reduction should be applied for his acceptance of responsibility. -2*

23. Total Offense Level: 19

24. Guideline Provisions: Based on a total offense of 19 and a criminal history category of I, the guideline imprisonment rage is 30 to 37 months.

25. Pursuant to Section 5E1,2, the fine range for the offense is $15,000 to $200,000.

WHEREFORE, PREMISED CONSIDERED, the Defendant respectfully prays that the aforementioned computations be utilized in assessing the punishment in the present case.

Respectfully submitted,
RAMSEY & TYSON

MICHAEL RAMSEY
2120 Welch
Houston, Texas 77019
713-523-7878
State Bar No. 16521000
174/response

*See Defendant's Sentencing Memorandun

[7]

APPENDIX E

DEFENDANT SUPPLEMENTAL MEMORANDUM OF OBJECTIONS TO PRESENTENCE REPORT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATE OF AMERICA)

VS.) CRIMINAL NO. H-98-183-S (01)

EDWARD L. PATTEN, M.D.)

DEFENDANT PATTEN'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF OBJECTIONS TO PRESENTENCE REPORT

TO THE HONORABLE DAVID HITTNER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION:

COMES NOW, EDWARD L. PATTEN, M.D., a Defendant in the above-entitled and numbered cause, by through his attorney of record, Michael Ramsey, and respectfully submits the following observations in response to the Addendum to the Presentence Report filled by the Probation Officer in this case:

1. In response to the Defendant's objection to Paragraphs 52 and 67 of the Presentence Report, it is alleged that "the Court may consider conduct for which the defendant has not been formally charged or which is not an offense of conviction, if the Court determines that those acts are part of the same course of conduct or common plan as the offense of conviction." See Addendum to Presentence Report at 30. The Probation Department therefore concludes that "quantities and types of drugs not specified in the counts of conviction are to

be included in the Offense Level, if part of the same course of conduct or common plan as the convicted offense." Id. This rule was occasioned by the January 15, 1988 amendments to the Guidelines.

[1]

A. The Defendant is alleged to have illegally dispensed Preludin, Biphetamine, and large quantities of Talwin NX during the period of time between May 1985 and December 1985. See Presentence Report at 20. It is therefore undisputed that this "relevant" conduct occurred prior to the January 15, 1988 amendments to the Sentencing Guidelines.

Section 1B1.2 to the Guidelines, prior to its amendment, provided that:

> "(a) The Court shall apply the guideline in Chapter Two (Offense Conduct) most applicable to the offense of conviction . . . .
>
> (b) The court shall determine any applicable offense characteristic, victim-related adjustment, or departure from the guidelines attributable to offense conduct, according to the principles in section 1B1.3 (Relevant Conduct)."

The version of Section 1B1.3 in effect at that time provided, in pertinent part, as follows:

> "Relevant Conduct
>
> To determine the seriousness of the offense conduct, all conduct, circumstances, and injuries relevant to the offense of conviction shall be taken in to account."

Guidelines at Appendix C.3, "Amendments to the Sentencing Guidelines Manual of October, 1987," (June 15, 1988) (emphasis added).

Taking these two Sections together, it would appear that under former Section 1B1.2, the proper guideline to be applied to the Defendant's conduct is that "most applicable to the offense of conviction". See United States v. Taplette, 872 F.2d 101, 106 (5th Cir. 1989). Since the

[2]

relevant conduct of the Defendant supposedly occurred prior to the June 15, 1988 amendments, there can be little doubt that it is appropriate to include the quantities of Preludin, Biphetamine, and Talwin NX alleged in Paragraphs 52 and 67 of the Presentence Report in computing the Base Offense Level.

B. While any information with "sufficient indicia of reliability to support its probable accuracy" may be considered in making the sentencing factfindings, Addendum to Presentence Report at 29, there must be "an acceptable evidential basis" for the determinations made at the sentencing hearing. United States v. Rodriguez, 897 F.2d 1324, 1326 (5th Cir. 1990), quoting United States v. Johnson, 823 F2d 840, 842 (5th Cir. 1987). A court is required to resolve specifically disputed issues of fact if it intends to use those facts as a basis for its sentence. Rodriguez, 897 F.2d at 1327.

The "reliable and credible information" upon which the allegations in Paragraphs 52 and 67 of the Presentence Report are based, constitute nothing more than conclusory

assertions which have not been tested by cross-examination. It should be observed that the Defendant had absolutely no notice that he would be required to prepare a defense against allegations which neither appeared in the indictment nor were adduced as extraneous offenses during the lengthy trial of this cause.

[3]

Thus, while the Defendant denies those allegations contained in Paragraphs 52 and 67 of the Presentence Report, he is somewhat limited in the ability to assert with specificity and clarity, each factual mistake of which he complains. The Defendant therefore respectfully requests a hearing on this matter at which time the reliability of this alleged "relevant conduct" can be adequately established. The Defendant further requests that pursuant to Section 6A1.3(b) of the Guidelines, that he be informed of the Court's tentative findings and be provided a reasonable opportunity for the imposition of the sentence in this case.

C. Finally, the Government has not alleged, nor has there been any proof, that the allegations concerning the dispensing of Preludin, Biphetamine, and large quantities of Talwin NX, were part of the same course of conduct or common plan as the offense for which the Defendant was convicted. It is therefore inappropriate to consider the computations alleged in Paragraphs 52 and 67 of the Presentence Report in determining the Base Offense Level in this case.

2. As regards Paragraphs 54 of the Presentence Report, the Defendant would respectfully reurge those principles contained in Paragraphs A through C in support of the proposition that the Defendant is only responsible for the

approximately Thirty-Four

[4]

Thousand Six Hundred Eighty Dollars ($34,680) in Medicaid claims paid for by the Texas Department of Human Resource.

Respectfully submitted,

MICHAEL RAMSEY
2120 Welch
Houston, Texas 77019
713-523-7878
Texas Bar No. 16521000
175/motion8

[5]

APPENDIX F

SENTENCING TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

THE UNITED STATES OF AMERICA

V.

EDWARD L. PATTEN, M.D.

CR-H-89-183-S
November 2, 1990
Houston, Texas
9:30 a.m.

BEFORE THE HONORABLE DAVID HITTNER

UNITED STATES DISTRICT COURT

SENTENCING

APPEARANCES:

For the United States: Mr. Michael Clark, AUSA
515 Rusk
Houston, Texas

For the Defendant: Mr. Michael Ramsey
Mr. Colin B. Amann
2120 Welch Street
Houston, Texas

Proceedings recorded and transcript produced by computer-aided transcription.

THE COURT: The Courts calls the case 89-183-S01, United States versus Patten. Who represents the government?

MR. CLARK: Michael Clark, Your Honor.

THE COURT: For the defense?

MR. RAMSEY: Michael Ramsey and Colin Amann, Your Honor.

THE COURT: Come on up, please.

All right. Just as I stated to today, there has been numerous addendums, objections, conferences with the Probation Department I'm sure with the government, and I have read everything, including all of the letters in this case.

All of the objections have been considered, and I will note the Court's ruling on each and every one. All of this has been read, together with the letters that were received by physicians and one public official on behalf of Dr. Patten.

I have gone through the whole thing. And this will all be considered. And additionally, I know you have got a request for a hearing; is that correct?

MR. RAMSEY: Yes, Your Honor. There is a request for a hearing in the event that the Court considers for guideline purposes unadjudicated conduct.

It is our position that it should not be considered in the absence of a hearing, and if the Court disregards unadjudicated conduct, then I believe I'm correct in

saying that our request is moot.

THE COURT: Well, that will all be ruled upon. That will all be ruled upon.

Aside from what is in writing from both the Government and the defense, that's all in the record, are there anything additional concerning the PSI at this time from the defense?

MR. RAMSEY: One matter, Your Honor.

THE COURT: Yes, sir.

MR. RAMSEY: And that has to do with what I hope is a new objection so far as application of the guidelines is concerned. I realize there has been a great deal of appellate work on it, but I suggest respectfully that, for the record, that the guidelines, the new guidelines under which this case is about to be sentenced, are in fact unconstitutional to the extent that they do not provide notice to any citizen, relative to potential punishment or consequences of their act.

I realize I'm not suggesting that ignorance of the law is a defense, but I am suggesting that in a government of laws, there has to be a body of law which is comprehensible.

THE COURT: So in other words, again, the position is that Dr. Patten was not on notice as to what the punishment would be under the guidelines?

MR. RAMSEY: Neither he nor any citizen could be reasonably expected to be, Your Honor, because they are so

dense, so opaque, so incomprehensible as to make them no notice at all.

And I do not believe that is an issue that has yet been litigated on appeal, or at least spoken precisely in that fashion, and to that extent, I object to them as being unconstitutional, therefore not cognizable by the court as being an attempt to deprive one of liberty without due process. Fifth Amendment.

THE COURT: I don't believe--you are talking about the Mistretta case, the initial case on the guidelines? Wasn't that the initial Supreme Court case?

I was one of about 100-some-odd judges in the country to declare that unconstitutional, but unfortunately the U.S. Supreme Court had other ideas by an 8 to 1 vote.

MR. RAMSEY: I understand, Your Honor.

THE COURT: It's an interesting point that raised. Is there any anything further on that point?

MR. RAMSEY: Nothing, Your Honor. There is no case law. That is a constitutional point that I urge.

THE COURT: All right. Overruled.

All right. Anything further from the Government that you haven't already put in writing and been read by the Court?

MR. CLARK: No.

THE COURT: All right. Mr. Ramsey, is there anything

you desire now to state on behalf of your client?

MR. RAMSEY: Your Honor, nothing other than what is contained--the Court I think has acknowledged that the Court has examined the sentencing memorandum.

THE COURT: I read everything.

MR. RAMSEY: What is said in that sentencing memorandum, Your Honor, I believe is all that we say. I will suggest to the Court that this is a case that wherein the Court could, or has the material before it for a rather creative sentencing. That is a training physician.

And that if the Court were to consider split sentence, that this is a true candidate for meaningful orders pertaining to community service, subject to strict supervision, of course, but I suggest that the material is here for that sort of sentence.

THE COURT: All right. Does your client desire to make a statement at this time?

MR. RAMSEY: Dr. Patten.

THE DEFENDANT: Yes sir, Your Honor. Approximately three years ago, I endeavored to save a disfunct hospital, a hospital in our community that was--

THE COURT: Riverside?

THE DEFENDANT: Riverside Hospital, yes, sir. I have taken money out of my pocket to give to administrators to pay salaries. I moved my office over there and I have done

everything I can to bring that hospital back.

I took Ms. Pope over there and showed her all the work that we have done. We have a 28-bed substance abuse program there that stays full.

We have the only chemical dependency program in the state of Texas that Medicaid has approved for in-patient care. We have got a lot of good things going.

I have been doing all this work, most of this work by myself. I have even written a proposal for the hospital. We have got a-- an emergency that's now refurbished and ready to go; intensive care unit that lacks about two months for us to get enough money and get the work done to get it open so that we can have a full-service hospital in that community.

We serve the University of Houston, Texas Southern University, and entire Third Ward area. Patients that walk to the hospital to get medical care. Walk miles. You know, they can't afford the transportation and so forth.

They can't afford to go to large hospitals and pay the emergency room fees, and buy medication for their kids and so forth. I think the Lord has sent me over there to do what I can to help my community. And I would just like to have as much time as I can to see that that's done.

THE COURT: Thank you.

Government.

MR. CLARK: Judge, I'm struck by the tragedy in this case. The tragedy to Dr. Patten personally and the tragedy to those people that have been victims because of his behavior.

And it struck me as difficult for the doctor to be engaging in work to treat people with chemical dependency, funded by the Medicaid program on the one hand, when the trial testimony established that on the other hand, he was allowing this type of poison into the system and allowing the Medicaid program to be bilked to treat these type of individuals.

It's a shame and it's a horrible situation the man here, a man of great respect in the community, finds himself, but he's the one that has put himself in that position, Your Honor. And I have set forth what I think are the relevant considerations in my sentencing memorandum, and I stand on those.

THE COURT: All right. Mr. Ramsey, do you know any reason why your client should not be sentenced at this time? I will give all of my reasons and go down it in just a moment.

MR. RAMSEY: No, Your Honor.

THE COURT: All right. In response to the defendant's request for a hearing to resolve the issues of reliability of the information contained in paragraphs 54, 52 and 67 of the pre-sentence report, the Court finds no hearing is needed.

In considering the reported information and the noted sources of the information, as well as the trial

testimony in this case, the Court is satisfied that the information contained in the pre-sentence report is accurate and reliable.

Further, the Court notes the defendant did receive ample notice regarding the allegations through the disclosure of the pre-sentence report, and has had ample opportunity to object and specifically refute the information. The defendant's objection to the inclusion of biphetamine, Preludin and additional Talwin NX is overruled.

The Court finds pursuant to Section 6A1.3 of the guidelines in 18 United States Code 3661, this information is appropriately included as it is based upon reliable and credible information.

Further, pursuant to Section 1B1.3, these drugs were part of the same course of conduct and common scheme as those drugs which were dispensed by this defendant during the conspiracy.

The Court finds that in addition to the drugs charged in the indictment, this defendant dispensed biphetamine and Preludin which totaled 45.92 grams of heroin equivalency, along with an additional 10,320 dosage units of Talwin NX during the course of the conspiracy.

Therefore the Court finds the total amount of drugs dispensed by this defendant is 52.525 grams of heroin equivalency.

The Court overrules the defendant's objections to the loss of Medicaid totaling $69,623.24. The Court finds the facts reflected in the pre-sentence report reliable pertaining to the total loss to Medicaid were based upon reliable and credible information.

These losses were part of the same course of conduct and common scheme as the instant offense. Therefore based upon Section 1B1.3 of the Guidelines, the Court finds the defendant is responsible for a loss of $69,623.24 to Medicaid.

The defendant's objection to the four level enhancement for organizer/leader is overruled. The Court finds this defendant functioned as the organizer/leader of five or more participants in the overall conspiracy, as well as each separate conspiracy.

Specifically, the drug distribution with the co-defendant Maggie Bullard and the Medicaid fraud with co-defendant Amos Oladimeji.

The defendant held the ultimate position of authority and responsibility for dispensing and verifying all of the fraudulent prescriptions and bogus Medicaid claims.

The defendant's involvement was critical to the conspiracy, as these offenses could not have been committed without his participation.

The defendant's objection regarding the denial of the two level downward adjustment for acceptance of

responsibility is overruled. The Court finds the defendant has not exhibited an affirmative or timely acceptance of personal responsibility for this criminal conduct.

Based upon these rulings, the Court finds the defendant's offense level is 27, his criminal history category is 1, resulting in a guideline range of 70 to 84 months. The Court adopts the pre-sentence report, including the findings and computations, in its entirety.

The statutory maximum in this case on a number of counts, on some of the counts, is is up to 20 years. I'm going to read a justification which I have written. Dr. Patten organized and directed an extensive drug dispensing operation which supplied the Third Ward and Fifth Ward areas of Houston with significant amounts of Schedule IV and II controlled substances, depressants and stimulants, for a period of at least four years.

He used his position as a physician to access drugs for illegal purposes, and defraud the Medicaid program. Even though he was involved in many philanthropic endeavors, which I have noted through some of the letters, he exploited his own community for the sake, I believe, of his own personal gain.

Despite the overwhelming evidence against him, he refused, in my mind, to accept responsibility for his criminal conduct, and attempted to obstruct justice when he became aware

of the investigation pending against him.

I believe that punishment and incapacitation to protect the community is a primary concern, and therefore pursuant to my estimation, I believe that a sentence at the higher end of the guideline range appears appropriate.

I do not feel it necessary to go above the range, which is the authority of a Federal judge, however. In my own personal opinion, that a medical license is the most respected and safeguarded licenses in our society, I believe what has occurred in this case is nothing less than a violation of public trust.

The guideline range, as I say, is 70 to 87 months, all without parole under the guidelines. The defendant is therefore sentenced to a term of 84 months, which is seven years in the Federal penitentiary.

Eighty-four months as to each of the Counts, 1, 5, 6, 12, 30, 39, 42, 48, through 54, 56, 58 through 61, 63, 66 through 69.

Sixty months as to Count 2, 70 through 87, 89 through 97, 100 through 101. Thirty-six as to Counts 3 and 4, 7 to 11, 13 to 22, 24 to 27, 29, 31 to 36, 38, 43 to 46, 57, and 62. All counts are to be served concurrently to each other.

Supervised release. The guideline term is three to five years. The guideline term will be five years as to the

initial--as to Counts 1, 3 through 22, 24 through 27, 29 through 36, 38 through 39, 42 through 46, 48 through 54, 56 through 63, 66 through 69; three years as to Counts 2, 70 through 87, 89 through 97, 100 through 101; all periods of supervised release are to be served concurrently.

During such term of supervision, the defendant shall not commit another Federal, state or local crime. The defendant is prohibited from possessing a firearm. The defendant shall not illegally possess a controlled substance.

The defendant is to abide by the standard conditions of supervision recommended by the U.S. Sentencing Commission and adopted by this Court.

Upon release from confinement, the defendant is to report to the U.S. Probation Department within 72 hours. The defendant shall participate in an in or an outpatient program of drug and/or alcohol addiction, dependency or abuse, with the necessary tests as ordered by the agency, all under the approval and direction of the U.S. probation officer.

The defendant shall adhere to the Court-ordered schedule toward the payment of a fine and restitution, and the defendant is required to provide the probation officer access to any financial information.

There is a known loss of $6,781.45 to the victims to the counts of this conviction in this case. It is ordered that the defendant be ordered to pay the entire amount of

restitution in this case within 30 days of sentencing, as the Court believes he has the financial ability to pay the same.

Payment should be made through the United States District Clerk's Office for disbursement to the Texas Department of Human Services, Vendor Drug Program, in care of the Attorney General's office, Medicaid Fraud Control Unit, 3000 South IH 35, Suite 200, Austin, Texas, 78704, attention Scott Wilson.

There is a fine in this case on some counts up to one million dollars. The defendant is ordered to pay a fine in this case of $100,000 as to each count of the conviction, to run concurrent to each other, and I'm going to request that the defendant touch base with the Probation Department to determine a reasonable payback schedule, which will be incorporated into this final order.

I don't at this time order this payable within any certain amount of time. I believe that the defendant's financial profile indicates that he has the ability to pay the fine without putting extreme hardship on his dependents.

There is a special assessment, $50, as to each of the 89 counts of which he was convicted, so there is a special assessment in the amount of $4450.

Dr. Patten has been on bond since June 1, 1989, and has made all of his reported dates and times. I believe he is an appropriate candidate for voluntary surrender so

incarceration is not ordered at this time.

Anything further from the Government?

MR. CLARK: No, Your Honor.

THE COURT: Anything further from the defense?

MR. RAMSEY: Your Honor, we would respectfully urge objections to the findings of the court relative to the guidelines and the application thereof, each and every separate one, which I did not do as the Court read the sentence, but I do urge those.

THE COURT: Thank you. All those objections are overruled.

I do want to make a statement: That notwithstanding this harsh sentence, the Court has total respect for the skill and advocacy of the defense team in this case. We stand adjourned.

(Court returns)

THE COURT: All right. Back on the record in the Patten case. Additionally, Dr. Patten, you are advised in open court you have a right to appeal this conviction and if you cannot afford an attorney on appeal, you will have an attorney appointed for you. That's now--Yes, sir.

MR. RAMSEY: I would observe for the record orally that I am retained and I will--I do give oral notice of appeal and will file it in writing.

THE COURT: Thank you. I'm sorry for the additional

delay. All right.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

I, June Simon, Official Court Reporter, United States District Court, Southern District of Texas, appointed, pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that I reported the proceedings had in the Above-styled and numbered cause on 11-2-90; that a transcript of said proceedings was later reduced to typewriting by me or under my personal supervision, and the above and foregoing 15 pages constitute a true and correct transcript thereof.

Given Under My Official Hand, this the 4th day of January, 1991.

June Simon
Official Court Reporter